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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~368~~ 131.

FELIX M. HANLEY, JEREMIAH G. WALLACE, AND HENRY W. WELLS, COMMISSIONERS AND MEMBERS OF THE RAILROAD COMMISSION OF ARKANSAS, APPELLANTS,

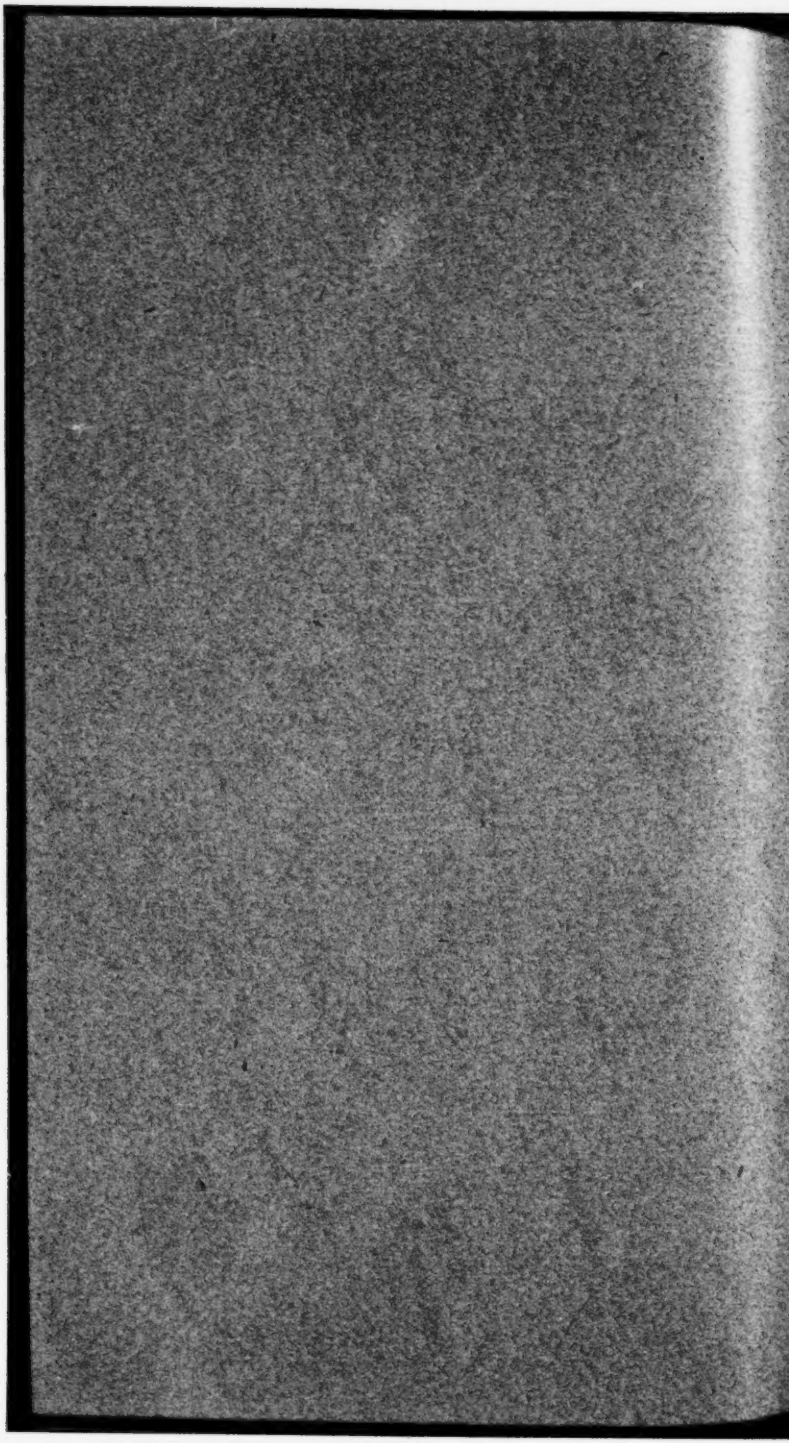
vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JULY 13, 1901.

(18,221.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 9, 1902.

1 Be it remembered that on the 3rd day of October 1900, came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, the Kansas City Southern Railway Company by Lathrop, Morrow, Fox and Moore Read and McDonough and C. W. Lucas, Esqs., its solicitors and filed on the chancery side of said court its bill of complaint against Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of the State of Arkansas which is in the words and figures following to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY *vs.* FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. Wells, Commissioners and Members of the Railroad Commission of State of Arkansas.	1336.

Original Bill of Complaint.

To the honorable judges of the circuit court of the United States for the eastern district of Arkansas, sitting in equity:

Your orator The Kansas City Southern Railway Company, a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and a citizen of
2 said State of Missouri brings this its bill of complaint against Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of the State of Arkansas, all citizens and residents of the State of Arkansas, and all of whom are residents and inhabitants of the eastern district of Arkansas.

And thereupon your orator represents and says that your orator is a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and having its principal office in Kansas City, in the State of Missouri, and is a citizen and resident of the State of Missouri; that Felix M. Hanley is a citizen and resident of the State of Arkansas and a resident and inhabitant of the eastern district of Arkansas; that Henry W. Wells is a citizen and resident of the State of Arkansas and is a resident and inhabitant of the eastern district of Arkansas; that Jeremiah G. Wallace is a citizen and resident of the State of Arkansas, and a resident and inhabitant of the eastern district of Arkansas.

Your orator further represents unto your honors that it is a common carrier of passengers and freight, and as such owns or controls, maintains and operates a line of railroad extending and running from Kansas City in the State of Missouri, to Ogden, on the State or eviding line between the State of Texas and the State of Arkansas,

and other lines as hereinafter set forth; that said line of railroad in going from said Kansas City to said Ogden traverses parts of the following States and Territories, viz: Missouri, Kansas, Arkansas and Indian Territory; that the route of said railroad is more particularly set forth as follows: viz: That it begins at Kansas City in the State of Missouri, and traverses or runs through
3 the following counties in the State of Missouri, viz: Jackson, Cass, Bates, Vernon and Barton to the State or dividing line between Missouri and Kansas; thence through the counties of Crawford and Cherokee, in the State of Kansas to the State or dividing line between Kansas and Missouri thence through the counties of Jasper, Newton and McDonald, in the State of Missouri, to the State or dividing line between the State of Missouri and the State of Arkansas; thence through the counties of Benton and Washington, in the State of Arkansas, for a distance of, to wit, 28.649 miles to the dividing line between the State of Arkansas and the Indian Territory; thence through the Indian Territory for a distance, to wit, of 127.781 miles to the State or dividing line between the Indian Territory and the State of Arkansas, where the Indian Territory adjoins the county of Polk, in the State of Arkansas; and on said line of railroad located in the said Indian Territory there are various stations or depots to the number of thirty and in said Indian Territory there are five junction points where freight and passengers are exchanged and transferred from other lines of railroad to that of your petitioner; thence through the counties of Polk, Sevier and Little River, in the State of Arkansas, for a distance of to wit, 117.618 miles, to the State or dividing line between the States of Arkansas and Texas; that your orator has a branch line of railroad running northeastwardly from Spiro, in the Indian Territory, to Fort Smith in the State of Arkansas, a distance of, to wit, 16 miles, about 15 miles of which distance is in the Indian Territory and about one mile of which is in the State of Arkansas; that the distance from Spiro to the State or dividing line between Arkansas
4 and Indian Territory is 48.745 miles; that the distance from the State or dividing line between Arkansas and Indian Territory to Grannis Arkansas is 52.155 miles; that your orator has, in Little River county in the State of Arkansas, a branch line of railroad running from Wilton northeastwardly to White Cliffs, a distance of about to wit 6 miles; and that at the said State or dividing line between the said States of Arkansas and Texas, the line of railroad owned or control-ed maintained and operated by your orator, as aforesaid connects with the line of railroad of the Texarkana and Fort Smith Railway Company, a railroad corporation duly created, organized and existing under and by virtue of the laws of the State of Texas; that said line of railroad of the said Texarkana and Fort Smith Railway Company traverses and extends through the counties of Bowie and Cass, in said State of Texas for a distance of to wit, 31.54 miles, to the State or dividing line between the county of Cass, in said State of Texas, and the county of Miller in the State of Arkansas; that at said State or dividing line between said county of

Cass, in said State of Texas, and said county of Miller, in said State of Arkansas, the said line of railroad of the said Texarkana and Fort Smith Railway Company again connects with the line of railroad owned or controlled, maintained and operated by your orator; that said line of railroad so owned or controlled, maintained and operated by your orator traverses and extends through the said county of Miller, in said State of Arkansas, for a distance of to wit, 6.429 miles, to the State or dividing line between the State of Arkansas and the State of Louisiana; thence through the said State of Louisiana to the State or dividing line between the
State of Louisiana and the State of Texas; that at the said
5 State or dividing line between said State of Louisiana and
Texas, the said line of railroad so owned or controlled, maintained and operated by your orator, as aforesaid, connects with another portion of the line of railroad of the aforesaid Texarkana and Fort Smith Railway Company; that said line of railroad of the said Texarkana and Fort Smith Railway Company travers- and extends from the said State or dividing line between said States of Louisiana and Texas as aforesaid, to Port Arthur, in the county of Jefferson in said State of Texas, where the southern terminal is located of the system of railroads known and designated as the "Port Arthur route," composed of the lines of railroad owned or controlled, maintained and operated by your orator and the said Texarkana and Fort Smith Railway Company, as hereinbefore fully set forth.

Your orator further represents that there are located upon that portion of the line of railroad owned or controlled, maintained and operated by your orator as aforesaid, which traverses and extends through the counties of Benton and Washington, in said State of Arkansas, as aforesaid, certain places or stations, known as shipping points, to and from which freight is shipped, as follows, to wit: Wye, Sulphur Springs, Gravette, Decatur, Doubling Track, Gentry and Siloam Springs; that Fort Smith which is also a shipping point, is situated at the northeast extremity of said branch of your orator's line of railroad extending, as hereinbefore set forth, from Spiro, in the Indian Territory to said Fort Smith, said Fort Smith being situated about one mile eastwardly in the State of Arkansas from the line dividing the said State of Arkansas from the said Indian Territory; that there are located upon that portion of the line of
railroad owned or controlled, maintained and operated by
6 your orator, as aforesaid, which traverses and extends through
the counties of Polk, Sevier and Little River, in said State of Arkansas, as aforesaid, certain places or stations, known as shipping points, to and from which freight is shipped as follows, to wit:— Howard, Rich Mountain, Harris, Rock Quarry, Quigley's, Eagle Gap Quarry, Acorn, Mena, Rust, Pryors, Two Mile Spur, Hatfield, Cove, Rock Crusher, Jansen, Hatton, Bowmans, Wickes, Womacks, Granniss, Ryders, Moores, Kinneys, Gillham, Kings, Pullman, Avon, Colemans, De Queen, Burlingame, Horatio, L. R. V. Crossing, Neal Springs, Morris Ferry, Logs Spur 1, Jackson Spur, Winthrop, Log Spur 2, Allene, Log Spur 3, otherwise known as Mistletoe, Wilton,

White Cliffs, Rankin, Ashdown, Hudson, and Ogden; that there is located upon that portion of the line of railroad owned or controlled, maintained and operated by your orator, as aforesaid, which traverses and extends through the county of Miller, in said State of Arkansas, as aforesaid a certain place or station, known as a shipping point, to and from which freight is shipped, and which is known and designated as Ravana; that whenever freight is shipped or transported from any of the aforesaid shipping points, in either of the said counties of Benton or Washington, in said State of Arkansas to Fort Smith, or to any of the aforesaid shipping points in either of the counties of Polk, Sevier or Little River, in said State of Arkansas, as aforesaid, said shipment must of necessity pass over a portion of your orator's line of railroad in the Indian Territory, as hereinbefore set forth; that whenever freight is shipped or transported from any of the aforesaid shipping points in either of the said counties of Benton or Washington, in said State of Arkansas, to Ravana, in said county of Miller, in said State of Arkansas,

7 such shipment must of necessity pass over that portion of the line of railroad of your orator, traversing and extending through the Indian Territory, as aforesaid, and also over that portion of the line of railroad of the said Texarkana and Fort Smith Railway Company, traversing and extending through the counties of Bowie and Cass, in the State of Texas, as hereinbefore set forth; that whenever freight is shipped or transported from Fort Smith to any of the aforesaid shipping points in either of the said counties of Benton or Washington, in the said State of Arkansas, as aforesaid, or to any of the aforesaid shipping points in either of the said counties of Polk, Sevier or Little River, in said State of Arkansas, such shipment must of necessity pass over a portion of your orator's line of railroad in the Indian Territory, as hereinbefore set forth; that whenever freight is shipped or transported from said Fort Smith to said Ravana, in said county of Miller, in said State of Arkansas, such shipment must of necessity pass over a portion of your orator's line of railroad, traversing and extending through the Indian Territory and the counties of Polk, Sevier and Little River, in said State of Arkansas, and also over that portion of the line of railroad of the said Texarkana and Fort Smith Railway Company traversing and extending through the counties of Bowie and Cass, in said State of Texas, as aforesaid; that whenever freight is shipped or transported from any of the said shipping points in either of the said counties of Polk, Sevier or Little River, in said State of Arkansas, to any of the said shipping points in either of the said counties of Benton or Washington, in said State of Arkansas, or to said Fort Smith, such transportation must of necessity pass over a

8 portion of your orator's said line of railroad traversing and extending through the Indian Territory, as hereinbefore set forth; that whenever any freight is shipped or transported from any of the said shipping points in either of the said counties of Polk, Sevier or Little River, in said State of Arkansas, to said Ravana, in said county of Miller, in said State of Arkansas, such shipment must of necessity pass over a portion of the line of railroad of the

said Texarkana and Fort Smith Railway Company traversing and extending through the counties of Bowie and Cass, in the said State of Texas, as hereinbefore set forth; that whenever freight is shipped or transported from said Ravana, in said county of Miller, in said State of Arkansas, to any of the shipping points in either of the counties of Polk, Sevier or Little River, in said State of Arkansas, such shipment must of necessity pass over that portion of the line of railroad of the Texarkana and Fort Smith Railway Company traversing and extending through the counties of Bowie and Cass, in said State of Texas, as hereinbefore set forth; that whenever any freight is shipped or transported from said Ravana to said Fort Smith, or to any of the aforesaid shipping points in either of the counties of Benton or Washington, in said State of Arkansas, such shipment must of necessity pass over that portion of the line of railroad of the said Texarkana and Fort Smith Railway Company traversing and extending through the counties of Bowie and Cass, in said State of Texas, as hereinbefore set forth; and also over that portion of your orator's line of railroad traversing and extending through the Indian Territory, as hereinbefore set forth.

Your orator further represents that it is a common carrier for hire and engaged in the carriage and transportation of persons
9 and property along the entire line of your orator's said railroad, and each and every part thereof, and to and from all stations thereon; that for the transportation of freight from any of the aforesaid shipping points in the State of Arkansas, to any of the aforesaid shipping points in the State of Arkansas, where the shipment passes over your orator's aforesaid line of railroad in the Indian Territory, or a portion thereof, the rate charged for such service includes the charge for that portion of the service rendered in the Indian Territory; that such rates so charged are within the limits and bounds of those permitted by the laws of the United States; that the said carriage and transportation of passengers and freight from any of the aforesaid shipping points in the State of Arkansas to any of the aforesaid shipping points in said State of Arkansas, where the passengers or shipment of freight pass over your orator's aforesaid line of railroad in the Indian Territory, or a portion thereof, or over the line of railroad of the said Texarkana and Fort Smith Railway Company in Texas, as aforesaid, constitute interstate commerce, and is under the exclusive jurisdiction of the Government of the United States and its laws, and is in no respect subject to or under the control of the State of Arkansas, its laws or its officers.

Your orator further represents that it is the successor and grantee of the Kansas City, Pittsburg and Gulf Railroad Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, with its principal office in Kansas City in said State of Missouri; that having purchased the property of the said Kansas City, Pittsburg and Gulf Railroad Company, at public sale, your orator took possession of the
10 same on April 1st, A. D. 1900, and that at all times subsequent thereto your orator has been in possession of and has

owned, controlled, operated and maintained the said property of the said Kansas City, Pittsburg and Gulf Railroad Company; that the line of railroad of the said Kansas City, Pittsburg and Gulf Railroad Company, so purchased and taken possession of by your orator as aforesaid, is the same line of railroad hereinbefore described and set forth as being owned or controlled, maintained and operated by your orator; that the said Kansas City, Pittsburg and Gulf Railroad Company acquired its right and authority to build that portion of the line of railroad now belonging to your orator, as hereinbefore set forth, which traverses and extends through the Indian Territory as aforesaid, by an act of Congress approved February 27th, A. D. 1893; that in and by said act of Congress, it is provided that "Congress hereby reserves the right to regulate the charges for freight and passengers on said railroad, and messages on said telegraph and telephone lines, until a State government shall be authorized to fix and regulate the cost of transportation of persons and freight within its respective limits by said railroad; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State;" that the said Kansas City, Pittsburg and Gulf Railroad Company maintained and operated that portion of the line of railroad now owned or controlled, maintained and operated by your orator in the Indian Territory as hereinbefore set forth, under and by virtue of the said act of Congress; that your orator succeeded to, all
11 the properties and rights of the said Kansas City, Pittsburg and Gulf Railroad Company upon the purchase of the property of the said company as aforesaid, and is therefore entitled to all the rights and privileges granted to said Kansas City, Pittsburg and Gulf Railroad Company under and by the said act of Congress and is subject to the right so reserved by Congress to regulate the rates and charges over that portion of the line of railroad of your orator situated in said Indian Territory, as aforesaid; that your orator is now maintaining and operating its said line of railroad in the said Indian Territory, as aforesaid, under and by virtue of the said act of Congress; and your orator therefore represents that the rates charged for the transportation of freight shipped from any of the aforesaid shipping points in the State of Arkansas to any other of the said shipping points in the State of Arkansas, when said shipment passes over a portion of your orator's said line of railroad within the said Indian Territory, as aforesaid, are governed and controlled solely by the Government and laws of the United States, and are in no respect subject to or under the control of the State of Arkansas, its laws or its officers.

Your orator further represents that there was passed by the legislature of the State of Arkansas, and approved by the governor of said State of Arkansas, on March 11th, A. D. 1899, and which is still in full force and effect in said State of Arkansas, an act entitled "An act to provide for the regulation of railroad freight and passenger tariffs in this State, to prevent unjust discriminations and extortion

in the rates charged for the transportation of passengers and freight,
and to prohibit railroad companies, corporations and lessees
12 in this State from charging other that just and reasonable
rates, to punish the same and prescribe a mode of procedure
and rules of evidence in relation thereto, and to appoint commissioners and prescribe rules for their government and define their powers and duties in relation to the same;" that a copy of said act is hereto attached, marked Exhibit "A," and to which complainant prays leave to refer upon the hearing of this bill; that said act contains, among others, a provision as follows, namely:

"That a railroad commission is hereby created, to be composed of three persons, to be appointed by the governor until the next general election, being with the advice and consent of the General Assembly in joint session, one to be chosen from the first and sixth one from the second and third, and one from the fourth and fifth congressional districts, to carry out the provisions of this act and whose successors shall be elected at each general election thereafter, from the congressional districts as hereinbefore provided.

After the expiration of the terms of office of the commissioners first appointed, the terms of office of their successors shall be two years."

And also contains another provision as follows:

"The commissioners herein provided shall be appointed or elected as aforesaid, and shall be resident citizens of this State, and qualified voters under the constitution, and not less than twenty-five years of age. No one shall be appointed or elected as such commissioner who is directly or indirectly interested in any railroad in this State or out of it, or in any stocks, bonds, mortgages, security, or the earnings of any railroad; and if such commissioner shall become so interested he shall within a reasonable time divest himself of such interest; failing to do this his office shall be de-
13 clared by the governor to be vacant."

And also another provision as follows:

"The governor shall fill all vacancies in the office of commissioner by appointment, and the person so appointed shall fill out the unexpired term of his predecessor."

And also the following provision:

"Said commission may hold sessions at any place in the State when deemed necessary, to facilitate the discharge of their duties or for the convenience of the parties litigant."

And also the following provision:

"That every person or corporation operating any railroad or express business in this State is hereby required to furnish said commission, within fifteen days after notice to do so, with the rate sheet and tariff charges for transportation of every kind over such railroad, it shall be the duty of said commission to examine and revise said rate sheet and tariff charges for freight or express matter for each railroad in this State, and to determine whether or not and in what manner, if any, such charges and rates are more than just and reasonable compensation for the services rendered, and whether or not and in what manner, if any, said charges and rates are in

violation of the provisions of this act; and said commission will make reasonable and just rates of freight, express and passenger tariffs to be observed by all persons and corporations operating any railroad or engaged in transporting persons or property as express or freight in this State; shall make rules and regulations as to charges at any and all points for the necessary hauling and delivering of express and freight; regulate rate and charges for such service on all railroads as, in their judgment justice to the
14 public and said person or corporation may require; and so make the same conform to the requirements of this act. And said commission, in making such rules and regulations, shall first give the person or corporation to be effected thereby notice to appear and show cause, if any it can, why no change should be made in the rates then in force, and shall take into consideration the character and nature of the service to be performed, the entire earnings of any railroad or express company, the expense of operating the same, the income and value thereof."

And also another provision as follows:

"And all the provisions of this act shall apply to all property and all the services in and about the transportation thereof, on one actually or substantial continuous carriage, or a part thereof and to the compensation therefor whether the same is carried wholly on one railroad or partly on several railroads, and whether the services are performed, or compensation paid or received by or to one person or corporation alone or in connection with another, or other persons or corporations."

And also another provision as follows:

"That each and every act, matter or thing in this act declared to be unlawful is hereby prohibited; and in case any person or corporation, as defined in this act, engaged as aforesaid, shall do, or permit to be done, any act matter or thing in this act required to be done, or shall be guilty of any of the violations of the provisions of this act, such person or corporation shall be held to pay to the person firm or corporation injured thereby, double the amount of damages so sustained, and all costs, to be recovered by the person firm or corporation so damaged, in any court having jurisdiction of
15 the amount, where the person or corporation causing the damage can be found, or has an agent or place of business."

And also the following provision:

"It shall be the duty of the railroad commission to hear all complaints made by any person, firm or corporation against any such tariff or charges so approved; to hear the parties to the controversy in person or by attorney, or both, and may take testimony, orally or in writing, and regulate argument thereon, and to conduct the investigation of such complaints in such manner as to the commission may seem best adapted to arrive at the truth."

And also the following provision:

"That if any person or corporation operating a railroad or express company in this State, or any receiver, trustee or lessee of any such person or corporation as aforesaid, shall violate any of the provisions of this act, or aid or abet therein, or shall violate the tariff of charges,

as fixed by said commission, or any of the rules regarding railroads or express companies, as made by said commission, and for which there is no other penalty prescribed in this act, such person or corporation, or receiver, trustee or lessee shall be liable to a penalty not less than five hundred nor more than three thousand dollars for each violation of this act, or such tariff of charges or rules and regulations, and such penalty may be recovered by an action to be brought in the name of the State of Arkansas, in the county in which such violation may occur. The commission shall institute such action, and actions for the recovery of the penalties prescribed in this act, through the prosecuting attorney of the proper district, and no such suit shall be dismissed or compromised without the consent
16 of the court and of said commissioners; and the prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five per cent. of the amount collected, and if any prosecuting attorney shall neglect for fifteen days after notice to bring suit, the commission may employ some other attorney-at-law to bring the same, who shall be allowed a fee therefor to be fixed by the court, not to exceed twenty-five per cent. of the amount collected, and in such case the prosecuting attorney shall not interfere."

And also the following provision:

"That the determination of every matter by said commission shall be in writing, and by the clerk spread upon a record kept for that purpose, which shall be a public record, and subject to inspection as such, and proof hereof shall be made by the clerk of said commission, which shall be received in evidence in the courts as certified copies of any other record. And when any matter has been determined by said commission in the course of any proceeding relating to the regulation or supervision of railroads, proof of the fact of such determination duly certified as aforesaid, shall be received in all civil actions in the courts of this State as *prima facie* evidence that such determination was right and proper."

And also the following provision:

"That if any person or corporation, operating any railroad or express company shall fail to comply with any provision of this act, such person or corporation shall be subject to a writ of mandamus, to be issued by any circuit court of this State, where such person or corporation has an office, agent or place of business, to compel a compliance with the provisions and requirements of said act, and
17 such writ shall issue in the name of the State of Arkansas at the relation of said commission appointed under the provisions of this act, and failure to comply with the requirements shall be punishable as for contempt."

And also the following provision:

"It shall be the duty of the commission herein provided for upon the complaint of any person, company or corporation in writing, charging any person or corporation, with discrimination or overcharge, to investigate the same and take such action in the premises as is provided in this act and the facts in the case justify."

And also the following provision:

"Be it further enacted, That all the provisions of this act shall

apply to and include all persons, companies or corporations carrying property on any railroad or express matter, and known as express companies, as fully as if such persons, companies or corporations were specially named and designated herein; and the words 'engaged in transporting persons or property' shall be held to include all carriers of property by railroad, whether the same are designated as freight or express."

Your orator further represents to your honors that, under and by virtue of said law, the said Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, were, by the governor of said State of Arkansas, on the — day of ——, designated and appointed as the three persons to compose the railroad commission as created in and by said act; that said Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells accepted said appointment as such commissioners, and, as such qualified by taking the oath prescribed by said act, and ever since said date of said appointment, and at all the times herein mentioned, they were and still are the duly qualified, appointed
18 and acting commissioners of the State of Arkansas under said act, and are public officials of the State of Arkansas, and under and by virtue of such appointment, have assumed the duties imposed upon them by said act and at all the times herein mentioned have been engaged in the discharge of said duties as such public officials.

Your orator further represents that said defendants, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, as such public official and claiming the right so to do by reason of and under the pretended authority, or color of authority, of the said act or law of the State of Arkansas, but without any real legal authority so to do, are claiming and asserting, and have claimed and asserted, the right as against your orator to regulate, determine and prescribe the rates which your orator, The Kansas City Southern Railway Company shall and may charge for transporting freight from or to any of said places or stations in the State of Arkansas to or from any other of said places or stations in the State of Arkansas, where the course of transportation, as hereinbefore set forth, is through or over a portion of said Indian Territory, or a portion of the State of Texas, as aforesaid; and have made and prescribed rates of charges for freight so transported or to be transported from or to any of said shipping points in the State of Arkansas to or from any other of said shipping points in the State of Arkansas, and whose carriage and transportation, as hereinbefore set forth, is through and over a portion of the Indian Territory, or a portion of the State of Texas as aforesaid; and have asserted and claimed, and still assert and claim, that the Kansas City Southern Railway Company, shall not for such service and transportation, as hereinbefore set forth, from any of said shipping points in the State of Arkansas to or from any
19 other of said shipping points in the State of Arkansas, where the transportation is through a portion of the Indian Territory, or a portion of the State of Texas, as aforesaid, charge more that the rates for such service prescribed, determined and fixed or undertaken to be so determined, prescribed and fixed, by said com-

missioners acting as said public officials aforesaid; and that as such public officials, they are endeavoring and attempting and threatening to compel said Kansas City Southern Railway Company to conform to the rates so determined, prescribed and fixed by them, as such public officials as hereinbefore set forth; and are threatening in case of refusal by your orator to comply with said schedule of rates for such transportation, as hereinbefore set forth, to visit upon your orator The Kansas City Southern Railway Company, the penalties prescribed in said act or law of the State of Arkansas, for violation thereof; that in pursuance of said pretended authority claimed by defendants Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, as such public officials, and claiming to act as such public officials, they have already cited your orator, The Kansas City Southern Railway Company to appear before them and answer the complaint of citizens of the State of Arkansas, by reason of the fact, and predicated upon the fact, that the charge made by your orator for transportation of freight from Fort Smith, in the State of Arkansas, to Grannis in the State of Arkansas, and passing in the course of transportation through said Indian Territory, as hereinbefore set forth, was in excess of the rate therefor so prescribed by said defendants, acting as such public officials; that the shipment complained of was a continuous one from Fort
20 Smith Arkansas to Grannis Arkansas and such shipment was on a through bill of lading; that said shipment so complained of as aforesaid moved in the State of Arkansas a distance of 52.155 miles and in the Indian Territory a distance of 63.841 miles; and proceeding upon such complaint, have, as such public officials, made a finding in writing that, as compared with the rate so pretended to be prescribed therefor by them as such public officials, your orator, The Kansas City Southern Railway Company has been guilty of making an overcharge in the matter of transportation of freight from Fort Smith, in the State of Arkansas, to Grannis, in the State of Arkansas, where the transportation was through the Indian Territory, as hereinbefore set forth; and have further found and stated in writing that your orator The Kansas City Southern Railway Company, is, by reason of such overcharge, liable to prosecution for the penalties provided in said act or law of the State of Arkansas; that a copy of such finding by said defendant commissioners is hereto attached and made a part hereof, and marked Exhibit "B," to which complainant prays leave to refer, and to cause the original to be produced upon the hearing of this bill; and thereupon your orator filed its petition for rehearing in said matter of complaint before said defendants herein and that said defendants herein overruled your orator's said petition for rehearing as will more fully appear by the said order entered by said defendants herein a copy of which order is hereto attached and made a part hereof and marked Exhibit "C."

Your orator further represents that the defendants Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of the State of Arkansas,

pretend to have authority and right, under and pursuant
21 to said act and law of the State of Arkansas, to hear complaints filed by the citizens of that State before them, charging that the rates of freight prescribed by your orator for transportation of freight from said shipping points in the State of Arkansas to other shipping points in the State of Arkansas, where the transportation is through the Indian Territory, or the State of Texas, as hereinbefore set forth, is not in accordance with the approved schedule of rates therefor undertaken and pretended to be prescribed by said defendants herein; and pretend to have authority and power derived from said law to hear the parties to such controversies and to take testimony therein and with reference thereto, and to regulate the argument thereon, and conduct an investigation thereof in such manner as to said defendants may seem best, and to arrive at the truth and determine whether the charges complained of are in violation of the rates established or approved by said defendant commissioners; but the right and authority so to do is hereby expressly denied by your orator.

Your orator further represents that the exercise of said pretended authority and action and conduct of said defendant commissioners, in pursuance thereof, undertakes to make a failure on the part of your orator to comply with the rates established by said defendants herein for the transportation and shipment of freight of the kind herein set forth a violation of the said act and law of the State of Arkansas, and to subject this complainant to the penalties in said act and law prescribed; that, as hereinbefore shown, by the provisions of said act, every violation thereof entails a penalty of not less than five hundred dollars or more than three thousand dollars upon any person or corporation operating a railroad in the State of Arkansas guilty of such a violation, such penalty to be re-
22 covered by an action to be instituted through the prosecuting attorney of the proper district, or through some other attorney if the prosecuting attorney neglects so to do for fifteen days, at the instigation of said defendants herein, in which action so instituted fees are to be allowed against the violator in an amount not to exceed twenty-five per cent. of the penalty recovered and that, as hereinbefore shown, should any person or corporation operating a railroad fail to comply with any of the provisions of said act, it should be subject to a writ of mandamus to compel a compliance therewith, said suit to be instituted in the name of the State of Arkansas and at the relation of said defendants herein, and that the said defendants pretended that, by reason of said act and law of the State of Arkansas, they have a right to compel this complainant to charge for transportation of freight from one point in the State of Arkansas to another point in the State of Arkansas, where a portion of the transportation is through the Indian Territory, as hereinbefore set forth, a rate not in excess of that prescribed by said defendants, and in case of failure to comply with such requirements, they pretended to hold your orator, The Kansas City Southern Railway Company, as a violator of said law and act of the State of Arkansas, and subject to all the penalties thereof.

Your orator further represents that the said places or stations hereinbefore mentioned, and so located as aforesaid within the State of Arkansas, upon the line of railroad therein of your orator are the shipping points for a large and populous district, and from all of such places large and various shipments are daily being made to a large number of other places, and from and to a large number of firms and corporations, all of whom are liable to, and as your
23 orator is informed and believes, will apply for rulings of the defendants herein similar to that herein specifically stated, and will seek to compel your orator to comply with rates for such shipments and transportation of freight as may be prescribed by the said defendants herein, under the alleged or pretended authority of said defendants; that said defendants herein will do and claim the right to investigate complaints as to the rates charged by your orator between any of the said places or stations where the transportation is from one point in the State of Arkansas to another point in the State of Arkansas, through that portion of the Indian Territory or the State of Texas as hereinbefore set forth; and claim the right to regulate such charges and determine whether the rates so charged by your orator are proper; and to revise the same and compel your orator with respect thereto to conform to the rates established and fixed therefor by the said defendants herein; and that in default of which, your orator will be and is now threatened with prosecutions at the instigation of said defendants herein, to recover the penalties prescribed in said act and law of the State of Arkansas for its refusal to comply with the rates of the said defendants herein with respect to transportation between points in the State of Arkansas, where the transportation is through the Indian Territory or the State of Texas, as hereinbefore stated, and are now threatened with some suits, and, as your orator is informed and believes, are liable to be threatened with a large number of other suits by a great number of persons, firms and corporations, shipping freight from any of said places or stations in the State of Arkansas to any other of said places or stations within the State of Arkansas, and where a portion of the transportation is
24 through the Indian Territory or the State of Texas, as hereinbefore set forth; all of which will lead to a great multiplicity of suits, and your orator will be greatly harrassed and annoyed by a great multiplicity of suits; all to your orator's great and irreparable loss and damage, unless this court shall restrain and enjoin the said defendants herein from acting or assuming to act as hereinbefore set forth, and from undertaking to regulate, determine and fix the charges and rates to be made and collected by your orator in transportation of freight between any of said places hereinbefore named and situated in the State of Arkansas, on the line of railroad of your orator, where such transportation is, as hereinbefore stated, over that portion of your orator's line of railroad located within the Indian Territory, and unless this court shall enjoin and restrain the defendants herein from undertaking to exercise any authority or power under said act and law of the State of Arkansas against your orator on account of freight rates or charges made by it on account

of shipment of freight from any point in the State of Arkansas to any other point in the State of Arkansas, where a portion of the transportation is, as hereinbefore set forth, over and through a portion of the Indian Territory or the State of Texas.

Your orator further shows that the controversy in this action is between citizens of different States, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of five thousand dollars.

Your orator further represents that a question is involved herein arising under the Constitution and laws of the United States as will appear by the allegations in the bill of complaint hereinbefore set forth, and the defendants herein to the great detriment and
25 irreparable injury of the property rights of your orator are undertaking to exercise a jurisdiction over the matter of regulatio*ns* commerce between the States, and to deprive your orator of its property and property rights without due process of law.

Your orator further represents that unless immediately restrained by order of this court, the penalties hereinbefore referred to will be undertaken to be enforced against your orator, on account of the particular instance in which, as hereinbefore set forth, the defendants herein, as said public officials, have already found your orator guilty of making an overcharge for a shipment of freight, and that other similar penalties are liable to be undertaken to be enforced against your orator at any time.

In consideration whereof, and forasmuch as your orator is remediless at and by the strict rules of the common law and relievable only in a court of equity, where matters of this kind are properly cognizable and relievable, your orator therefore prays that said defendant*d* Felix M. Hanley, Jeremiah G. Wallace and Henry W. Well commissioners and members of the railroad commission of Arkansas, and each of them, be enjoined and restrained from in any manner interfering with or undertaking to exercise any authority over charges or rates for freight made by your orator The Kansas City Southern Railway Company for shipment from any point in the State of Arkansas to any other point in the State of Arkansas, or to any point in any other State, where any portion of such transportation is through the Indian Territory, or any other State than the State of Arkansas, as hereinbefore set forth, and from undertaking to fix or determine any such rates, or from undertaking to compel your orator, The Kansas City Southern Railway Company,
26 to respect or comply with any rates or charges for such shipments and transportation of freight as may be made by the defendant- herein, acting in their official capacity and from entertaining or hearing or determining any controversies between citizens of the State of Arkansas and your orator, The Kansas City Southern Railway Company on account of any such charges for shipments of freight made by your orator, and from citing your orator to appear to answer to any such charges, and from instigating, directing or instituting any prosecution for penalties or otherwise against your orator, on account of any charges, and from making any orders with reference thereto or any of the fore-

going matters; and that until the hearing hereon of the application for a temporary injunction a restraining order, of like tenor and effect as the injunction above prayed, be issued against the defendants, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, and each of them; and that your orator may have such other and further relief in the premises as the case may require and to this court shall seem meet; and may it please your honors to grant unto your orator the subpœna of the United States of America, issueing out of and under the seal of this honorable court directed to Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, defendants herein, therein and thereby commanding them and each of them to be and appear, at a certain day, and under a certain penalty therein to be expressed, before this honorable court, and then and there to answer, but not under oath (such answer under oath being hereby expressly waived), all and singular the premises, and to stand to and abide by and
27 perform such orders, directions and decrees as may be made against them or either of them in the premises, as shall seem meet and agreeable to equity and good con-cience.

And your orator, as in duty bound, will ever pray, etc.

(Signed) THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By LATHROP, MORROW, FOX AND MOORE,
READ AND McDONOUGH, AND
C. W. LUCUS, *Its Solicitors.*

MAX PAM, *Of Counsel.*

STATE OF ARKANSAS,)
County of Pulaski.)

C. W. Lucus being first duly sworn deposes and says that he is one of the solicitors and counsel for the complainant in the foregoing complaint. That he has read said bill of complaint and knows the contents thereof. That the allegations therein contained so far as they relate to his own acts are true, and so far as they relate to the acts of others, he believes them to be true. That the reason this verification is not made by the Kansas City Southern Railway Company is that the complainant is a corporation of the State of Missouri, having its principal office in the city of Kansas City in the State of Missouri. That no officer or director other than affiant competent to make this verification on behalf of said corporation is within this jurisdiction.

(Signed) C. W. LUCUS.

Sworn to before me and subscribed in my presence this 3rd day of October, A. D. 1900.

(Signed) W. P. FEILD, *Clerk.*

28 EXHIBIT "A."

Act LIII.

"An act to provide for the regulation of railroad freight and passenger tariffs in this State, to prevent unjust discriminations and extortion in the rates charged for the transportation of passengers and freight, and to prohibit railroad companies, corporations and lessees in this State from charging other than just and reasonable rates and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto; and to appoint commissioners and to prescribe rules for their government and define their powers and duties in relation to the same."

29 Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That a railroad commission is hereby created, to be composed of three persons to be appointed by the governor, until the next general election, by and with the advice and consent of the General Assembly in joint session, one to be chosen from the first and sixth, one from the second and third, and one from the fourth and fifth congressional districts, to carry out the provisions of this act, and whose successors shall be elected at each general election thereafter from the congressional districts as hereinbefore provided. After the expiration of the terms of office of the commissioners first appointed, *the terms of office of the commissioners first appointed*, the terms of office of their successors shall be two years. The salary of each commissioner shall be twenty-five hundred dollars ($2500.00) per annum to be paid from the State treasury, in the same manner that the salaries of other State officers are paid.

SEC. 2. The commissioners herein provided shall be appointed or elected as aforesaid, and shall be resident citizens of this State, and qualified voters under the constitution, and not less than twenty-five years of age. No one shall be appointed or elected as such commissioner who is directly or indirectly interested in any railroad in this State or out of it, or in any stocks, bonds, mortgages, security, or the earnings of any railroad; and if such commissioner shall become so interested he shall within a reasonable time divest himself of such interest; failing to do this, his office shall be declared by the governor to be vacant. And in case any commis-

30 sioner becomes disqualified from any cause or in any way, he shall at once remove the disqualification or resign, and on failure to do so, he must be suspended by the governor.

SEC. 3. No commissioner hereunder shall hold any other office under the Government of the United States or of this State or of any other State government; and shall not while such commissioner engage in any occupation or business inconsistent with his duties as such commissioner.

SEC. 4. The governor shall fill all vacancies in the office of commissioner by appointment, and the person so appointed shall fill out the unexpired term of his predecessor.

SEC. 5. Before entering upon the duties of his office, each of said commissioners shall take and subscribe to the oath of office prescribed in the constitution and shall, in addition thereto, swear that he is not directly or indirectly interested in any railroad, nor in any bonds, stocks, mortgages, securities, contracts or earnings of any railroad, and that he will to the best of his ability faithfully and justly execute and enforce the provisions of this act, and all laws of the State concerning railroads, which oath shall be filed with the secretary of state.

SEC. 6. The commissioners appointed shall meet at Little Rock and organize and elect one of their members chairman of said commission. A majority of said commissioners shall constitute a quorum to transact business. Said commission may appoint a secretary at a salary not to exceed fifteen hundred dollars ($1,500) per annum, and one stenographer at a salary not to exceed one thousand dollars ($1,000) per annum. The secretary shall keep
31 full and correct minutes of all transactions and proceedings of said commission, and perform such other duties as may be required by the commission. The commissioners may have power to make all needful rules for their government. They shall be known collectively as the "Railroad commission of Arkansas," and shall have a seal, the coat of arms of Arkansas with the words "Railroad commission of Arkansas," engraved thereon. They shall be furnished with an office in the capitol at Little Rock with necessary furniture, stationery, supplies and all necessary expenses not to exceed five hundred dollars ($500) per annum for subsequent years, to be paid for on the order of the governor.

SEC. 7. The commissioners, secretary and stenographer shall be entitled to receive from the State their actual necessary traveling expenses, which shall include the cost only of transportation while traveling on the business of the commission, to be paid out on the order of the governor upon an itemized statement thereof, sworn to by the party who incurred the expense and approved by the commission.

SEC. 8. Said commission may hold sessions at any place in
32 the State when deemed necessary, to facilitate the discharge of their duties, or for the convenience of the parties litigant.

SEC. 9. That every person or corporation operating any railroad or express business in this State is hereby required to furnish said commission, within fifteen days after notice to do so, with a rate sheet and tariff charges for transportation of every kind over such railroad, it shall be the duty of said commission to examine and revise said rate sheet and tariff charges for freight or express matter for each railroad in this State, and determine whether or not, and in what manner, if any, said charges and rates are more than just and reasonable compensation for the services rendered, and whether or not and in what manner, if any, said charges and rates are in violation of any of the provisions of this act; and said commission will make reasonable and just rates of freight, express and passenger tariffs to be observed by all persons and corporations operating any railroad or engaged in transporting persons or prop-

erty as express or freight in this State; shall make rules and regulations as to charges at any and all points for the necessary hauling and delivering of express and freight; regulate rates and charges for such service on all railroads as, in their judgment, justice to the public and said person or corporation may require; and so make the same conform to the requirements of this act. And said commission, in making such rules and regulations, shall first give the person or corporation to be effected thereby notice to appear and show cause, if any it can, why no change should be made in the rates then in force, and shall take into consideration the character and nature of the service to be performed, the entire earnings of any railroad or express company, the expense of operating the same,
33 the income and value thereof. And when any tariff of charges is corrected and approved, said commission shall append a certificate of its approval to said tariff of charges and give notice thereof to any officer or agent of the railroad or express company to be effected thereby, and said tariff and charges shall be kept posted up for at least five days before the same shall go into effect. And said commission shall accordingly fix rates and tariffs of charges for those express companies and railroads, the officers of which fail to furnish rate sheets or tariffs of charges as above required. Said commission shall not alter or change any tariff or charges so approved by it except upon ten days' notice in writing to the person or corporation operating the express company or railroad to be effected by such change, giving the same an opportunity to be heard; such notice to be by delivering a copy thereof to any officer or agent of such person or corporation.

SEC. 10. That all persons or corporations engaged in the transportation of passengers or property shall and are hereby required to keep posted up at every depot under the control of or in use by such person or corporation, in a conspicuous place therein, plainly and legibly printed schedules which shall state: first, the different kinds and classes of property to be carried; second, the different places between which property shall be carried; third, the rate of freight or express charges for carriage between such places, and for all services connected with the transportation of such property, from it- receipt until it is delivered or forwarded. Such schedules shall be posted for at least five days before the same shall go into effect, and the same shall remain in force until another schedule shall, as aforesaid, be posted; and every person or corporation en-
34 gaged, as aforesaid, shall receive, load, unload, transport, store and deliver to the consignee thereof any and all property offered for shipment, whether as freight or express matters at and for charges not greater than those specified in such schedule, as may at that time be in force, and shall, on demand, issue to shippers, duplicate freight or express receipts, which shall state the class of freight shipped, the weight and charges. And all the provisions of this act shall apply to all property, and all the services in and about the transportation thereof, on one actually or substantially continuous carriage, or a part thereof, and to the compensation therefor, whether the same is carried wholly on one railroad or partly on

several railroads, and whether the services are performed, or compensation paid or received by or to one person or corporation alone or in connection with another, or other persons or corporations; provided, that at such points where freight or express are subject to competition by water routes not controlled by this act nor complying with its provisions, the schedule herein provided for may be posted and go into immediate effect.

SEC. That it shall be unlawful for any person or corporation engaged alone or associated with others in the transportation of passengers, or property, by railroad in this State, as freight or express, directly or indirectly, to demand or receive from any person, firm, company or corporation, any greater or less rate or amount of compensation than is demanded or received from any other person, firm, company or corporation for substantially similar and contemporaneous services, or to allow any person, firm, company or corporation, directly or indirectly, any rebate, drawback or other advantage in any form, or to make any preference in
35 furnishing cars or motive power. And all persons or corporations engaged as aforesaid, shall furnish, without discrimination or delay, equal and sufficient facilities for the transportation of passengers, the receiving, loading and unloading, storing, carriage and delivery of all property, of a like character carried by him, them, or it; and shall perform, with equal expedition, and at uniform rates, the same kind of services connected with the contemporaneous transportation thereof as aforesaid. And it shall be unlawful for any person or corporation engaged as aforesaid to enter into any contract or agreement, by changes of schedule, use of different cars, or any other means or device, with intent to delay or prevent the shipment of such property from being continuous from the place of shipment to the place of designation, whether carried on one or more railroads.

SEC. 12. That it shall be unlawful for any person or corporation engaged in the transportation of passengers or property, as mentioned in the preceding section of this act, to make or enter into any contract, agreement or combination, directly or indirectly, for the pooling of freight, or to pool the freight of the different railroads or lines, by dividing between them the gross or net earnings of such railroads or any part thereof, or by equalizing, evening up or dividing the property or passengers carried by such railroads. But nothing in this act shall be so construed as to prevent any person or corporation operating a railroad in this State from issuing or selling at reduced rates, emigrant, excursion or commutation tickets, or from carrying free or at reduced rates any property for schools, churches, fairs, exhibitions or charitable institutions, or for the State or the United States, or any of the United States.

36 SEC. 13. That it shall be unlawful for any person or corporation engaged as aforesaid to demand or receive any greater amount of compensation for a similar amount and kind of property for receiving, storing, loading, unloading, carrying or delivering the same under similar circumstances and conditions for a shorter than for a longer distance, which includes the shorter distance; and the

road of any person or corporation shall include all the railroads in use by it, whether owned or operated by it under a contract, agreement or lease by such corporation or with which it has a traffic contract.

SEC. 14. That each and every act, matter or thing in this act declared to be unlawful is hereby prohibited; and in case any person or corporation, as defined in this act, engaged as aforesaid, shall do, or permit to be done, any act, matter or thing in this act required to be done, or shall be guilty of any of the violations of the provisions of this act, such person or corporation shall be held to pay to the person, firm or corporation injured thereby, double the amount of damages so sustained, and all costs, to be recovered
37 by the person, firm or corporation so damaged, in any court having jurisdiction of the amount, where the person or corporation causing the damage can be found, or has an agent or place of business. No action aforesaid shall be sustained unless brought within one year after the cause of action, or within one year after the party complaining shall have come to the knowledge of his or her right of action. And as many causes of action as may have accrued within the year to any one person, firm or company, may be joined in the same suit or complaint.

SEC. 15. It shall be the duty of the railroad commission to hear all complaints made by any person, firm or corporation against any such tariff of charges so approved; to hear the parties to the controversy in person or by attorney, or both, and may take testimony orally or in writing, and regulate argument thereon, and to conduct the investigation of such complaints in such manner as to the commission may seem best adapted to arrive at the truth, and when any changes are made in any tariff of charges, notice thereof shall be given to the person or corporation to be affected thereby; provided, in no instance shall any person or corporation operating a railroad or express company, the schedule of charges which have been submitted to, revised and approved by the commission, be civilly or criminally liable for the making of any charge which has been authorized by the tariff of charges so approved, or the rules and regulations prescribed by the commission.

SEC. 16. That every person or corporation operating a railroad or express company having an agent or office in the State shall, upon notice to do so, furnish said commission with all the informa-
38 tion required to enable said commission to perform its duties relative to the management of their respective lines, and connecting lines, and particularly with copies of all leases, contracts and agreements with other lines, express companies or sleeping car companies, and shall furnish all such information as to the number of persons employed in the different departments of their service and the wages paid the same, as said commission may require.

SEC. 17. That it shall be the duty of every person or corporation operating any railroad or express company in this State to make annual returns of the business of said railroad or express company to the railroad commission of Arkansas, which returns shall embrace all receipts and expenditures of said railroad or express com-

panies in this State, and to make according to forms furnished by the commission for that purpose; said returns shall be made within thirty (30) days after the end of each year to which they relate; and the first return shall be furnished within thirty (30) days after the passage of this act, unless further time is granted by the commission; said returns shall be sworn to by some officer of said railroad or express company having knowledge of the matters therein stated. And any such person or corporation who shall fail or refuse to make such returns shall be liable to a penalty of fifty dollars ($50) for each day of such failure or refusal, such penalty to be recovered by action commenced in the name of the State of Arkansas in any court having jurisdiction of the amount, such action to be prosecuted as hereinafter provided.

SEC. 18. That if any person or corporation operating a railroad or express company in this State, or any receiver, trustee, or
39 lessee of any such person or corporation as aforesaid, shall violate any of the provisions of this act, or aid or abet therein, or shall violate the tariff of charges, as fixed by said commission, or any of the rules regarding railroads or express companies, as made by said commission, and for which there is no other penalty prescribed in this act, such person, or corporation, or receiver, trustee or lessee shall be liable to a penalty of not less than five hundred ($500) nor more than three thousand dollars ($3000) for each violation of this act, or such tariff of charges or rules and regulations, and such penalty may be recovered by an action to be brought in the name of the State of Arkansas, in the county in which such violation may occur. The commission shall institute such action, and actions for the recovery of the penalties prescribed in this act, through the prosecuting attorney of the proper district, and no such suit shall be dismissed or compromised without the consent of the court and of said commissioners; and the prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five per cent. of the amount collected, and if any prosecuting attorney shall neglect for fifteen days after notice to bring suit, the commission may employ some other attorney-at-law to bring the same, who shall be allowed a fee therefor to be fixed by the court, not to exceed twenty-five per cent. of the amount collected, and in such case the prosecuting attorney shall not interfere; provided, that in all trials of cases brought for a violation of any tariff charges by said commission, it may be shown in defense that such tariff so fixed was unjust. Nothing in this section shall be so construed as to in any manner interfere with the action for damages as provided in section fourteen (14) of this act.

SEC. 19. That the determination of every matter by said
40 commission shall be in writing, and by the clerk spread upon a record kept for that purpose, which shall be a public record, and subject to inspection as such, and proof hereof shall be made by the clerk of said commission, which shall be received in evidence in the courts as certified copies of any other record. And when any matter has been determined by said commission in the course of any proceeding relating to the regulation or supervision of railroads,

proof of the fact of such determination, duly certified as aforesaid, shall be received in all civil actions in the courts of this State as *prima facie* evidence that such determination was right and proper.

SEC. 20. That the provisions of this act shall not be construed as to require said commission to investigate or call upon any railroad or express company for its schedule or tariff of charges in the transportation of passengers or property from any point wholly outside of this State, or in any way interfere with such rates or charges.

SEC. 21. That the expenses of the commission shall be paid from the State treasury on the warrant of the auditor of State, the same to be paid quarterly and the clerk of said commission shall, at the end of each quarter, make out an itemized account of all the expenses incurred by said commission, fees paid to officials for issuing and serving notices, processes, witness fees, and any other expenses actually paid and which are authorized by this act; and said account shall be examined by said commission and approved by them if correct, and said account so approved shall be filed with the auditor of State, and he shall issue his warrant on the State treasurer for the amount of said account, and deliver the same to the clerk of said commission, and the State treasurer is hereby author-
41 ized to pay the same, and all fines and penalties recovered by the provisions of this act shall be paid into the State treasury, to the credit of the general fund.

SEC. 22. That if any person or corporation, operating any railroad or express company shall fail, refuse or neglect, after notice by said commission, to put up its rate sheet, giving its tariff of charges in the manner, place and time, as provided in this act, or to furnish said commission with the rate sheet and tariff of charges as provided for in this act, or to furnish cars and motive power for the prompt transportation of freight as provided in this act, or to comply with any provision of this act, or to make returns as required by this act, such person or corporation shall be subject to a writ of mandamus, to be issued by any circuit court of this State, where such person or corporation has an office, agent or place of business, to compel a compliance with the provisions and requirements of said act, and such writ shall issue in the name of the State of Arkansas at the relation of said commission appointed under the provisions of this act, and failure to comply with the requirements shall be punishable as and for a contempt.

SEC. 23. It shall be the duty of the commission herein provided for, upon the complaint of any person, company or corpora-
42 tion, in writing, charging any person or corporation with discrimination or overcharge, to investigate the same and take such action in the premises as is provided in this act and the facts in the case justify.

SEC. 24. Be it further enacted, That all the provisions of this act shall apply to and include all persons, companies or corporations carrying property on any railroad as express matter, and known as express companies, as fully as if such persons, companies, or corporations were specially named and designated herein; and the words "engaged in transporting persons or property" shall be held to in-

clude all carriers of property by railroad, whether the same are designated as freight or express.

SEC. 25. The commissioners, or either of them, shall have the right, at such times as they may deem necessary, to inspect the books and papers of any railroad company, and to examine under oath any officer, agent or employee of such railroad in relation to the business and affairs of the same. If any railroad shall refuse to permit the commissioners, or either of them, to examine its books and papers, said railroad company shall, for each offense, pay to the State of Arkansas not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each day it shall so fail and refuse.

SEC. 26. Any officer, agent or employee of any railroad company who shall, upon proper demand, fail or refuse to exhibit to the commissioners, or either of them, any book or paper of such railroad company which is in the possession or under the control of such officer, agent or employee, shall be deemed guilty of a misdemeanor, and upon conviction in any court having jurisdiction thereof
43 shall be fined for each offense a sum not less than one hundred dollars ($100) nor more than five hundred dollars ($500).

SEC. 27. The commission shall ascertain as early as practicable the amount of money expended in the construction and equipment per mile of every railroad in Arkansas, the amount of money expended to procure the right of way, and the amount of money it would require to reconstruct the road-bed, track, depots and to replace all the physical properties belonging to the railroad. It shall also ascertain the amounts paid for salaries to the officers of the railroad, the wages paid to employés and the operating expenses of each and every railroad in the State, including repairs and interest in indebtedness. When the information required by this section is obtained it shall be communicated to the attorney general by report, and a duplicate of same filed with the auditor for public use, and said information shall be printed from time to time in the annual report of the commission.

SEC. 28. The commission shall make and submit to the governor annual reports, containing a full and complete account of the transactions of their office, together with the information gathered by such commission as herein required, and such other facts, suggestions and recommendations as may be by them deemed necessary, which report shall be published as the reports of the heads of departments.

SEC. 29. The said commission, in making any examination or investigation provided for in this act, shall have power to issue subpœnas for the attendance of witnesses, and every witness who shall appear by order of the commission at a place outside of the county of his residence shall receive for his attendance one dollar and fifty cents ($1.50) per day, and five cents per mile,
44 traveled by the nearest practicable route, in going to and returning from the place of meeting of said commission, but witnesses who reside within the county in which the commission meets shall receive one dollar and fifty cents ($1.50) per day for

each day's attendance, but no mileage, which shall be paid upon the warrant of the auditor, upon the presentation of the proper vouchers, sworn to by such witness approved by the chairman of the commission; provided, that no witness shall be entitled to any witness fees or mileage who is directly or indirectly interested in any railroad in this State, or out of it, or who is in anywise interested in any stock, bond, mortgage, security or earnings of any such road, or who shall be the agent or employee of such road. or any officer thereof, when summoned at the instance of such railroad, and no witness furnished with free transportation shall receive pay for the distance he may have traveled on such free transportation. In case any witness shall fail or refuse to obey such subpœna said commission may issue an attachment for said witness, directed to any sheriff or any constable in the State of Arkansas, and compel him to attend before the commission and give his testimony upon such matters as shall be lawfully required of them. If a witness, after being duly summoned, shall fail or refuse to attend or to answer any question propounded to him and which he would be required to answer if in court, the commission shall have the power to fine and imprison such witness for contempt, in the same manner that a judge of the circuit court might do under similar circumstances. The claim that any such testimony may tend
45 to criminate the person giving it shall not excuse such witness from testfying; but the person so testifying shall not be prosecuted or subject to any penalty or forfeiture, for or account of any transaction, matter or thing concerning in any way such case or proceeding; provided, that no person shall be exempt from perjury in so testifying; provided further, the commission shall in all cases have the right to issue proper process and take depositions instead of compelling personal attendance of witnesses. The sheriff or constable executing any process under the provisions of this bill shall receive such compensation as may be allowed by the commission, not to exceed fees as now prescribed by law.

SEC. 30. That the remedies hereby given shall be regarded as cumulative, and this act shall not be construed as repealing any statute giving such remedies.

SECTION 31. All acts and parts of acts inconsistent with this act are hereby repealed, and this acts shall take effect and be in force from and after its passage.

Approved March, 11th, 1899.

46 EXHIBIT "B."

FORT SMITH CHAIR COMPANY
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY.

Opinion of Felix M. Hanley, Commissioner.

The state of facts upon which this case is submitted is as follows: The plaintiff The Fort Smith Chair Company shipped over the road

of the defendant a lot of chairs from its factory at Fort Smith, Arkansas to Grannis, a station also in the same State. The transportation was continuous and over the same line of road. The freight in transit passed out of the State of Arkansas into the Indian Territory and back again into the State. The defendant demanded and received for the transportation an amount which exceeds the maximum rate as fixed by the railroad commission of Arkansas for the distance from Fort Smith to Grannis in the sum of $1.81.

The defendant claims that the transportation was interstate commerce and not subject to control by the State.

The question presented is one purely of law and involves the determination of whether the transaction constitutes domestic or interstate commerce upon which depends the jurisdiction of the State to control the same.

We are aware that the Interstate Commerce Commission has held a similar transaction to be interstate commerce, which holding seems to have been acquiesced in by the Texas railroad commission. While it would be pleasant to be in harmony with these two great bodies we deem it safe to follow the courts *can* we ascertain in what direction lies the weight of judicial opinion.

In the earlier discussion of the provisions of the Constitution of the United States under which Congress derives its powers
47 to regulate commerce with foreign nations and among the States and the Indian tribes, the question arose whether transportation and navigation were embraced in the term commerce. All doubt as to this was set at rest by the decision in Gibbon *vs.* Ogden 9 Wheaton 1, where it was held that the term commerce includes navigation as clearly as if it had been specially mentioned in the grant. In the case last above cited, the Supreme Court of the United States also defines the phrase "among the States" as used "in the constitutional provision above mentioned to mean 'intermingled with.'" The court further says, "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or effect other States. Such a power would be inconvenient and is certainly unnecessary," Gibbon *vs.* Ogden, *supra.* In another case it was held by the Supreme Court of the United States that Congress had the right to regulate the liability of owners of vessels navigating the high seas, but engaged, only, in the transportation of goods and passengers between ports and places in the same State. The reason for this holding is given in the following language: "The Pacific ocean belongs to no one nation, but is the common property of all mankind. When therefore the Ventura went out from San Diego or San Francisco on her several voyages she entered on a navigation which was necessarily connected with *either* nations. While on the ocean her national character only was recognized and she was subject to such laws as the commercial nations of the world had by usage or otherwise agreed on for the government of vehicles of commerce occupying this common prop-

erty of mankind. She was navigating among the vessels
48 of other nations, and was treated by them as belonging to the country whose flag she carried. True she was not trading with them, but *but* she was navigating with them and consequently was engaged with them in commerce. If in her navigation she inflicted wrong on another country the United States, and not the State of California, must answer for what was done. In every just sense, therefore she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of 'external concern,' affecting the nation as a nation in its external affairs. It must therefore be subject to the National Government." Lord *vs.* Steamship Company 102 U. S. 541.

The question presented here, in a somewhat different form, was passed upon by the Supreme Court of the United States in Lehigh Valley Railroad Company *vs.* Pennsylvania. Under the statutes of Pennsylvania a tax is levied upon the receipts of railroads derived from domestic freight and passenger traffic. The Lehigh Valley road refused to pay such taxes on its receipts from freight transported between Mauch Chunk and Philadelphia, alleging that such traffic was interstate commerce, because in its passage it was carried for some distance over territory of the State of New Jersey. The commerce however was held to be domestic and the validity of the tax upheld.

Chief Justice Fuller in delivering the opinion of the court says: "If it happened through engineering difficulties, as the interposition of a mountain or river, the line was deflected so as to
49 cross the boundary, and to run for the time being in another State than that of its principal location does such detour impress an external character or internal intercourse. For example, the Nashville Chattanooga and St. Louis Railroad Company is a corporation created under the laws of the State of Tennessee, and through freight and passengers transported from Nashville to Chattanooga pass over a few miles in Alabama and perhaps two miles in Georgia, but we had not supposed that the circumstances would render the taxation of that company in respect of such business by the State of Tennessee invalid." In the same decision occurs this language. "It should be remembered that the question does not arise as to the power of *a* any other State than the State of the terminal, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania nor as to the regulation by Pennsylvania of the operation of this or any other company elsewhere, but it is simply whether the carriage of freight and passengers between two points in one State, the more passagee over the soil of another State rendered that business foreign which was domestic. We do not think such a view can be reasonably entertained." Lehigh Valley Railway Company *vs.* Pennsylvania 145 U. S. 192.

The supreme court of Iowa had the question involved directly be-

fore it and following the decision of the Lehigh Valley case held that "shipments between points in the same State do not constitute interstate commerce because made on a railroad which runs for part of the trip in another State, and the rate fixed by the railroad commission governs." Cambell *vs.* Chicago, Milwaukee & St. Paul R. R. Co. — Iowa 587.

The same doctrine has been announciated by the supreme
50 courts of both Missouri and North Carolina. See

Seawell *vs.* Kansas City, Fort Scott & Memphis R. R. 119 *No.* 222

State *vs.* Western Union Telegraph Co. 113 N. C. 213

Leavell *vs.* Western Union Telegraph Co. 116 N. C. 211.

Upon examination of the subject presented we conclude that the weight of authority justifies the statement of the law as made by a late text-writer in the following language.

"The power to regulate domestic and interstate commerce resides in the States; the States may make such regulations as they deem expedient or politic for the government of commerce within their borders; provided that the regulations do not violate some consitutional provision. If the place from which the passengers or property are transported and place to which they are carried are both within the territorial limit of the same State and the carriage is continuous, then the transportation is interstate commerce although in course of carriage the passengers or property — may be on line of transportation pass beyound the borders of the State. To the rule that where both the place where the passengers or property are received and the place of destination are within the territorial limits of the same State is interstate commerce and subject to State regulations, there is an exception and that exception is this If the carriage is over the high seas, although from place to place in the same State, it is interstate commerce and *and* cannot be regulated by the State." Elliott on Railroads sec. 690. We are therefor- constrained to hold that the transportation of the goods from Fort Smith Arkansas to Grannis, Arkansas though passing through the Indian Territory en route, constitutes domestic commerce and as such is subject to regu-
51 lation of this commission. That the amount demanded by defendant and paid by the plaintiff constitutes an overcharge in the sum of one and $\frac{81}{100}$ dollars and the defendant is liable to prosecution for a penalty for such overcharge.

In re FORT SMITH CHAIR COMPANY
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

Now on this day come the defendants, The Kansas City Southern Railway Company by C. W. Lucus and James F. Read, its attorneys, and the petition for rehearing, heretofore filed, coming on to be heard, was presented to the commission. And the commission, being well and truly advised in the premises, doth overrule the said petition for rehearing, and hereby orderes and directs that the

said Kansas City Southern Railway Company comply with and maintain the rates heretofore established by the commission from points in Arkansas to other points in Arkansas where such shipment passes through a portion of the Indian Territory, or any other State *other* than the State of Arkansas.

To which action and ruling of the commission the said Kansas City Southern Railway Company, by its counsel, hereby excepts.

I hereby certify that the above and foregoing is a true copy of the order this day entered overruling the petition for rehearing heretofore filed in this cause by said defendant The Kansas City Southern Railway Company.

Witness my hand this 3rd day of October, 1900.

H. W. WELLS, *Chairmen.*

52 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 9th day of April anno Domini, one thousand nine hundred, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber district judge presiding and holding said —, the following proceedings were had, to wit: On October 5th, 1900.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. WELLS, Commissioners and Members of the Railroad Commission of Arkansas. } 1336.

This cause having come on to be heard this day upon the application of the complainant herein The Kansas City Southern Railway Company, for an injunction against the defendants herein, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, as prayed for in the bill of complaint herein, and it appearing to the court that due and sufficient notice of such application has been given to said defendants and each of them, and service thereof accepted by them, and the said complainant being present in open court but the defendants failing to appear, and the court having read and examined the bill of complaint herein and having heard the arguments and statements of counsel and being fully advised in the premises;

It is therefore hereby ordered, adjudged and decreed that said defendants Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, and each of them, be and are hereby enjoined and
53 restrained from in any way or manner interfering or undertaking to exercise any authority over, or to fix or determine any charges or rate of freights, made by the complainant, The Kansas City Southern Railway Company, for transportation or shipment

of freight from any point in the State of Arkansas, to any other point within the State of Arkansas, where any portion of such shipment of freight is through, over or along the Indian Territory, or any part thereof, or any other State of Territory than the State of Arkansas, or any part thereof.

It is hereby further ordered, adjudged and decreed that said defendants, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, and each of them be, and they are hereby enjoined and restrained from instituting any proceedings, and from taking any other steps or action whatsoever to compel the complainant herein, The Kansas City Southern Railway Company, to respect or comply with or enforce any charges or rate of transportation or shipment of freight from any point in the State of Arkansas to any other point within the State of Arkansas, when any portion of such transportation or shipment of freight is through, over or along the Indian Territory, or any part thereof, or any other State or Territory than the State of Arkansas, or any part thereof.

It is hereby further adjudged and decreed that the said defendants Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, and each of them be, and they are hereby enjoined and restrained fr-m entering or hearing or determining any complaint against the complainant herein, The Kansas City Southern Railway Company, or any controversy between the said complainant and any citizen of the State of Arkansas in reference to any, or on account of any charges or rates of transportation or shipment of freight from any point in the State of Arkansas to any other point in the State of Arkansas, where any portion of such transportation or shipment of freight is through, over or along the Indian Territory, or any part thereof, or any other State or Territory than the State of Arkansas, or any part thereof.

It is hereby further ordered, adjudged and decreed that said defendants, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, and each of them, be, and they are hereby enjoined and restrained from instituting, instigating or directing any proceedings or prosecuting for penalties against the complainant The Kansas City Southern Railway Company, on account of, or with reference to, the charges or rates of transportation or shipment of freight from any point in the State of Arkansas to any other point within the State of Arkansas, where any portion of such transportation or shipment is through, over or along the Indian Territory, or any part thereof, or any other State or Territory than the State of Arkansas, or any part thereof, or for undertaking, directly or indirectly, to hold said complainant, The Kansas City Southern Railway Company, accountable to these defendants, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, or any of them, on account of or with reference to any charges or rates which said complainant, The Kansas City Southern Railway Company has or

may charge for the shipment or transportation of freight as aforesaid. This order enjoining and restraining the said defendants Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, shall be and remain in full force and effect until the further order of this court after the execution by said complainant of a bond with good and sufficient securities in the sum of ten thousand dollars conditioned to pay to the defendants or their successors in office all costs and damages which may result from the issue of this order, if it shall be finally determined that the same was improperly issued, or that may be awarded to them by reason of the granting of this order.

(Signed) JACOB TRIEBER, *Judge.*

54 And on the same day the following proceedings were had to wit:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
F. M. HANLEY, &C., ET AL. } 1336.

Comes the complainant by C. W. Lucus, Esq., its solicitor, and files herein its injunction bond in the sum of ten thousand dollars ($10,000.00) with the Fidelity and Deposit Company of Maryland as surety, which is approved in open court by the judge.

Which bond is as follows:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. Wells, Commissioners and Members of the Railroad Commission of the State of Arkansas. } 1336.

Know all men by these presents that we the Kansas City Southern Railway Company, as principal, and the Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of the State of Arkansas, and their successors in office, in the just and full sum of ten thousand dollars ($10,000.00), for the payment of which, well and truly to be made, we do hereby jointly and severally
55 bind ourselves, and each of our successors, heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 5th day of October A. D. 1900, upon conditions as follows:

Whereas the Honorable Jacob Trieber, district judge of the United States for the eastern district of Arkansas, has granted a restraining order in this cause, upon condition that the said com-

plainant shall cause to be executed a good and sufficient bond to the defendants for the sum of ten thousand dollars ($10,000.00), to secure them against all costs and damages, which may be awarded to them in case said order shall be finally determined to have been improperly granted:

Now, therefore, if the said Kansas City Southern Railway Company shall well and truly pay the said defendants all costs and damages which may be awarded to them, in case said court shall finally determine that said order was improperly granted not exceeding the sum of ten thousand dollars ($10,000.00), then this obligation to be null and void; otherwise to remain in full force and effect.

Witness our hands and seals this 5th day of October, A. D. 1900.

(Signed) THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By C. W. LUCUS, *Its Assistant Gen. Att'y.*
FIDELITY AND DEPOSIT COMPANY OF MD.,
By S. R. COCKRILL, *Att'y-in-fact.*
[SEAL.] J. E. COATES, *Gen'l Agent.*
Attest:

(Five five-cent revenue stamps.)

Approved:
JACOB TRIEBER, *Judge.*

Filed October 5th, 1900.

W. P. FEILD, *Clerk.*

56 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 22nd day of October, anno Domini, one thousand nine hundred, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. district judge, presiding and holding said court, the following proceedings were had, to wit: November 5th, 1900.

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs. } 1336.
FELIX M. HANLEY, &C., ET AL.

Come the defendants by Felix M. Hanley, Esq., their solicitor, and file herein their joint and several demurrer to the bill of complaint. Which demurrer is as follows:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. Wells, as Commissioners and Members of the Railroad Commission of Arkansas. } 1336.

The defendants by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same is therein set
57 forth and alleged, doth demur to said bill, and for cause of demurrer sheweth:

That the plaintiff hath not in his said bill made or stated such a cause as entitles him, in a court of equity, to an injunction against these defendants, or either of them, or to any relief against these defendants or either of them.

Wherefore and for divers other good causes of demurrer appearing in said bill, the defendants doth demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any forther answer to the said bill, and prays to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

(Signed) HENRY W. WELLS.
FELIX M. HANLEY, *Defd.*

I hereby certify that the demurrer in this cause is in my opinion well founded and not interposed for delay

(Signed) FELIX M. HANLEY, *Attorney.*

Filed November 5th, 1900.

W. P. FEILD, *Clerk.*

And on December 15th, 1900, the following proceedings were had to wit

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. Wells, Commissioners and Members of the Railroad Commission of the State of Arkansas. } 1336.

Comes the complainant by Lathrop, Morrow, Fox and Moore, Read and McDonough and C. W. Lucus Esqs., its solicitors and comes the defendant by Winchester and Martin Esqs., its
58 solicitors, and the demurrer of the defendant to the bill heretofore filed herein now coming on for hearing and the court having heard argument of counsel thereon and not now being well and sufficiently advised in the premises takes time to consider of its judgment herein.

And on February 5th, 1900, the following proceedings were had to wit:

Opinion of the Court.

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE of Arkansas. } 1336.

On demurrer to the bill.

The allegations in the bill are, that the complainant is a railroad corporation existing under the laws of the State of Missouri, owning a line of railroad and operating it as a common carrier of passengers and freight from Kansas City, in the State of Missouri to Ogden on the line dividing the States of Arkansas and Texas that said railroad traverses parts of the following States and Territories to wit: Missouri, Arkansas Kansas and Indian Territory; that after leaving the State of Missouri it runs through the State of Arkansas for 28.649 miles; thence through the Indian Territory for a distance of 127.781 miles, then again into the State of Arkansas, which it traverses for a distance of 117.618 miles; that it also
59 has a branch line from Spiro, in the Indian Territory, to Fort Smith, in the State of Arkansas, fifteen miles of which is in the Indian Territory and one mile in the State of Arkansas; that it also owns other branches running from points in the State of Texas and the Indian Territory for short distances to points in the State of Arkansas, and along which lines there are numerous stations to and from which freight is shipped; that whenever any freight is shipped from these stations to Fort Smith or from Fort Smith to them, such shipments must of necessity pass over complainant's line of railroad extending through the Indian Territory, and to points in Miller county, Arkansas, also through the State of Texas; that the defendants, who compose the railroad commission of the State of Arkansas claim and assert, under the authority of that State, the right to regulate the charges for carrying freight by complainant from and to places in the State of Arkansas, where the course of transportation is mostly through and over the Indian Territory or in the State of Texas, and have prescribed rates of charges for freight thus transported for the largest portion through the Indian Territory or State of Texas, and threaten, upon the refusal of complainant to comply with their schedules and charges, to visit it with the penalties prescribed by the laws of the State of Arkansas for violations of the orders of the railroad commission; that, in pursuance to their alleged authority, they have cited complainant to appear before them and answer the complaint of citizens of the State of Arkansas, by reason of the fact that complainant charges for the transportation of freight from Fort Smith Arkansas, to Gran-

nis, in the same State, passing in the course of transportation through the Indian Territory for the largest portion of the trip, a rate
60 in excess of that prescribed by the commission, although the shipment complained of was a continuous one from Fort Smith to Grannis, on a through bill of lading, and moved in the State of Arkansas only 52.155 miles, and in the Indian Territory a distance of 63.841 miles that upon the hearing of said complaint, the commissioners made a finding that complainant had been guilty of an overcharge and by reason thereof is liable to prosecution for the penalties prescribed by the laws of the State of Arkansas; that the complainant's plea to the jurisdiction of the commission was by it overruled, it claiming to have the power to regulate charges for shipments between points in the State of Arkansas, although the largest portion of the haul was through and over the Indian Territory; that the penalty prescribed by the laws of the State of Arkansas for each violation of the order of the commission is a fine of not less than five hundred dollars nor more than three thousand dollars, to be recovered by an action instituted by the State's attorneys, or if not instituted by them within fifteen days, such action may be instituted by an attorney, who is to receive for his services twenty-five per cent. of the penalty imposed and recovered.

The bill further charges that complainant does a large carrying business between stations in the State of Arkansas, but which it must carry principally on the line of road in the State of Texas and the Indian Territory and, if the defendants are not restrained by injunction, a large number of suits will be instituted by parties against complainant for the penalties prescribed by the laws of the State, to the great detriment and irreparable injury of complainant.

A temporary injunction having been granted, after due notice
61 thereof to the defendants, the defendants have filed a demurrer to the bill upon the ground that, upon the allegations made, complainants are not entitled to any relief.

Lathrop, Morrow, Fox & Moore; C. W. Lucus; Read and McDonnough, for complainants.

Felix M. Hanley and Winchester & Martin for the defendants.

TRIEBER, *District Judge:*

The only question involved and argued by counsel is whether, upon the facts set out in the bill, the carriage of freight by a railroad operating a continuous line of road in several States and Territories from one point in a State to another point in the same State, when the course of transportation must be for a considerable distance in another State or Territory, is subject to regulations made by the board of railroad commissioners of that State, or whether such traffic is interstate or intrastate. If the former, it is conceded by counsel for the defendants that the railroad commission of the State of Arkansas has no power to regulate the charges for carrying freight, and the demurrer to the bill should be overruled.

The language of section 8, article 1 of the Constitution of the United States is, that Congress shall have power to "Regulate commerce with foreign nations, and among the several States, and with

the Indian tribes." But for this provision in the Constitution, each sovereign State would have the right to regulate and tax all commerce coming from the other States, or passing through it. Shipments from one point in a State to another in the same State would, the moment they entered the other State, although intended
62 only for passage through that State, be subject to the control of the authorities of that State. Under the Articles of Confederation, in force prior to the adoption of the Constitution each of the State- claimed and was conceded that privilege. No doubt to avoid this interference with the foreign commerce, as well as that among the States, was one of the great objects of the framers of the Constitution and one of the important causes giving rise to the calling of the convention which framed the Constitution. Mr. Madison in paper No. 42 of the Federalist, speaking of this subject said:

"The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proof and remarks which former papers have brought into view on this subject it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete and ineffectual. A very material object of this power was the relief of the States which export and import through other States, from the improper contributions levied on them by the lat-er. Were these at liberty to regulate the trade between State and State it must be foreseen, that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the lat-er, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquil-ity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain."

In his Journal of the Constitutional Convention, vol. 1, page
63 46, Mr. Madison, in speaking of the defects in the Articles of Confederation says:

"The same want of a general power over commerce led to an exercise of the power, seperately, by the States which not only proved abortive, but engendered rival, conflicting and angry relations."

And further on he says, on page 48:

"Such were the defects, the deformities, the deseases and the

omaious prospects, for which the convention were to provide a remedy and which ought never to be overlooked in expounding and appreciating the constitutional charter, the remedy that was provided."

On page 60, Mr. Madison in enumerating the deficiencies of power under the concederacy, said, among other things that:

"The Federal Government could not defend itself against encroachment from the States."

It is now well settled that this grant to Congress gives it exclusive control of commerce among the States and absolutely deprives the States of any and all power to legislate in any manner interfereing with or impeding interstate commerce. Gibbons *vs.* Ogden, 9 Wheat. 1, 186; Passenger cases, 7 How. 395, 400 Cooley *vs.* Port Wardens 13. How. 310. Robins *vs.* Shelby District, 120 U. S. 492; Wabash, etc. Railway Co. *vs.* Illinois, 118 U. S. 573; Leisy *vs.* Hardin, 135 U. S. 108; Bridge Company *vs.* Kentucky, 154 U. S. 218; Smyth *vs.* Ames, 169 U. S. 466; and it is equally well settled that the power granted to Congress by the Constitution does not extend to commerce wholly within a State. Gibbons *vs.* Ogden, *supra;* Greer *vs.* Connecticut, 161 U. S. 513.

While in the case at bar the railroad does not traverse a State other than the State of Arkansas, but a Territory with no legislative powers, these powers have been reserved by Congress to itself, this cannot in any way effect the determination of the issues involved,

as it is a jurisdiction seperate and distince from the State of
64 Arkansas and it can no more be invaded by that State than if it were a sovereign State. Congress alone has the power to regulate the internal affairs of the Indian Territory, prescribe regulations for railroads therein, limit their charges for the transportation of freight and passengers and exercise the power which in a State belongs to the people of that State. American Insurance Company *vs.* 356 Bales of Cotton, 1 Pet. 541; United States *vs.* Gratiot, 14 Pet. 534; National Bank *vs.* Yankton, 101 U. S. 133; Corporation, etc. *vs.* United States 136 U. S. 1.

The right of way through the Indian Territory now enjoyed by complainant was derived from Congress, which granted it to complainant's predecessor. In the act of granting the right of way, Congress exercised the power to regulate and limit the rates of transportation over the soil of the Territory: The language used is:

The said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rates authorized by the laws of the State of Arkansas for services or transportation of the same kind, provided that passenger rates on said railroad shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railroad and messages on said telegraph and telephone lines until a State government shall be authorized to fix and regulate the cost of transportation of persons and freight within its respective limits by said railroad; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State; provided

however, that the rates of such transportation of passengers, local or interstate, shall not exceed the rates above expressed; and provided further that said railroad company shall carry the mail at such price as Congress may by law provide, and until such rate is fixed by law the Postmaster General may fix the rate of compensation."

U. S. Statutes at Large, vol. 27, page 487;
Act of Congress, February 27, 1893.

The Indian Territory must therefore, for the purpose of this suit, be treated as if it were a State possessing all the powers and
65 attributes of any of the States comprising the Union.

The power of the State to prescribe rates for railroads engaged in domestic commerce is not absolute but must be exercised with due regard to the rights of the owners, or otherwise the power would be equivalent to that of confiscation of property without due process of law. Smyth *vs.* Ames, 169 U. S. 466. Mr. Justice Harlan, speaking for the court in that case says:

"We hold however, that the basis of all calculations as — the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." 169 U. S. 546.

The railroad commission of the State in fixing rates must consider all these matters, and if the rate fixed for domestic traffic solely, is in disregard of these principles and if, upon a hearing it is found that the rates fixed by the commission are so low as to prevent a railroad company from earning an amount at least sufficient to pay the owners some profit, although it may be but small, it is the duty of the court to prevent the enforcement of such a tariff by the commission. Chicago, etc. R'y Co. *vs.* Minnesota, 134 U. S. 418; Chicago, etc. R'y *vs.* Wellman, 143 U. S. 339; Reagan *vs.* Farmers' Loan and Trust Company, 154 U. S. 363; Chicago etc. R'y Co. *vs.* Tompkins 176 U. S. 167.

66 To determine that question the commission must have the power to investigate all these matters. It would have to take into consideration the laws and regulations duly enacted by or in behalf of the Indian Territory, which in any way add to the cost of carrying on the business of a common carrier. It must make

allowance for the additional expense thus incurred by reason of enactments which, as has been held by the Supreme Court, the States have the power to impose under the Constitution of the United States, even as to trains engaged in interstate business. The State may, if it sees proper, enact laws requiring locomotive engineers to be examined and licensed by a State board, even in the case of an engineer operating a locomotive attached to a train running from a point in that State to points in another State. Smith *vs.* Alabama 124 U. S. 465. Nashville, etc. R'y Co. *vs.* Alabama, 128 U. S. 96. It may prohibit freight trains from running on the Sabbath, although in effect thereby preventing freight trains carrying interstate freight from running. Hennington *vs.* Georgia, 163 U. S. 299. It may regulate the speed of railroad trains within the limits of cities, regardless of the fact whether the train is used for interstate commerce or not. Erb *vs.* Morasch, 177 U. S. 584. It may regulate and prohibit limitations in bills of lading issued in the State by a railroad company, although the freight is to be transported to other States. M., K. & T. R'y *vs.* McCann 174, U. S. 580. It may by legislation regulate the heating of passenger cars, although used in interstate transportation. Railroad Co. *vs.* New York. 165 U. S. 628. It may require a reasonable number of passenger trains to stop at cities of a certain size, although such trains may be engaged in interstate transportation. Railway Co. *vs.* Ohio. 173
67 U. S. 285 Gadsden *vs.* Minnesota 166 U. S. 416. The law-making power of the State may require a breakman for every freight car; it may prohibit what is called "double headers;" it may limit the hours of the employés of railroad corporations and enact other reasonable regulations; Stone *vs.* Trust Co. 116 U. S. 307, 334 and perhaps in consideration of these additional burdens imposed on the railroads, allow a greater charge for the transportation of passengers, as well as freight through its territory than neighboring States in which no such burdens are imposed. But how is the commission of one State to take into consideration these laws and regulations of other States? Yet in the case at bar it is attempted by the defendants to regulate charges without such investigation and they seek to fix the rate of transportation over complainant's road as to shipments which are carried less than half of the distance in this State, and the rest in the Indian Territory. No State has the power to authorize a commission to fix rates arbitrarily with no power in the courts to stay the hands of the commission if it chooses to establish rates that are unequal and unreasonable. In Chicago, etc., Co., *vs.* Minnesota, *supra*, the State has attempted to invest the railroad commission with such a power and the supreme court of the State has upheld the act but on appeal to the Supreme Court of the United States that court held:

"This being the construction of the statute by which we are bound in considering the present case we are of opinion that so construed it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wis-

dom of successive ages for the investigation judicially of the truth of a matter in controversy and substitutes therefor as an absolute finality the action of a railroad commission which in view of the powers conceded to it by the State court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

68 The rate from a certain point to another is a unit. In Wabash, etc., Railway Company *vs.* Illinois, *supra*, the court says:

"A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois Railroad Company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty miles shorter than the distance to Peoria.

"So also, in the present case, the owner of corn, the principal product of the country desireing to transport it from Peoria in Illinois to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a car-load, but is compelled to pay at the rate of twenty-five cents per hundred pounds because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon a distance of twenty-three miles in which the loading and unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.

"The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to transportation which includes Illinois in a long line of carriage through several States

shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of
69 the United States, whose enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules."

Counsel for the defendants rely solely upon the decision of the Supreme Court in Lehigh Valley Railroad Company *vs.* Pennsylvania 145 U. S. 192 and the decisions of the supreme courts of the States of Missouri, North Carolina and Iowa, in Sawell *vs.* Kansas City, etc. Rai-way Company 119 *No.* 222; State *vs.* Western Union Telegraph Co. 113 N. C. 213; and Campbell *vs.* C. M. & St. P. R. R. Co. 86 Iowa, 587.

The decisions in the latter cases are based upon what was supposed to have been determined in the Lehigh Valley case it is therefore only necessary to examine that case for that decision is conclusive in this court in the issues involved and before the court.

If everything said by the learned Chief Justice, in his opinion in that case is applicable to this cause the demurrer to this bill must be sustained, but a careful examination of that opinion clearly shows that those parts of the opinion on which defendants rely were not necessary for the determination of the issues involved in that case, and must be considered as *obiter dicta:* The question before the court in the Lehigh Valley case is thus stated by the learned Chief Justice, who delivered the opinion of the court:

"The receipts named in class two are confined to that part of the transportation from Mauch Chunk to Phillipsburg and the taxation to the mileage wholly within the State of Pennsylvania; and the question is whether this taxation in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from Mauch Chunk by way of Trenton New Jersey amounts to a regulation of interstate commerce." 145 U. S. 200.

70 And in another part of the opinion he says:

"The tax under consideration was determined in respect of receipts for the proportion of the transportation within the State but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another State than that of the origin and destination of the particular freight and passengers." Page 201.

And the learned Chief Justice calls special attention to the fact that:

"It should be remembered that the question does not arise as to the power of any other State than the State of the terminal, nor as to the taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of the freight between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic." Page 202.

That case therefore must be limited as an authority to the questions before the court, and to no others. If this view is correct, it necessarily follows that the case at bar is clearly distinguishable from the Lehigh Valley case.

In Pacific Coast S. S. Co. *vs.* Railroad Commissioners, 9 Sawyer, 253; S. C. 18 Fed. 10, Mr. Justice Field says:

"To bring the transportation within the control of the State as a part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State. If the ships of the plaintiffs carried any persons or merchandise between parts of the State not going out, on their voyage between those ports, of the jurisdiction of the State, and the persons or merchandise carried not coming from any other State or foreign country, or going to another State or country, the transportation commencing and ending in the State then to that extent they would be engaged in commerce purely domestic, and to that extent the railroad commissioners might have jurisdiction to regulate fares and freight for transportation of the vessels." 18 Fed. 13.

In Hall *vs.* De Guir, 95 U. S., 485, the validity of a civil rights statute of the State of Louisiana *do* so far as it affected passengers traveling in a steamboat on the Mississippi river between ports in *in* that State, was held void as a burden upon interstate

71 commerce.

The facts in that case were, that a person of color took passage upon a boat plying as a regular packet for the transportation of freight and passengers between New Orleans, in the State of Louisiana, and Vicksburg in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, from a point in Louisiana to another in the same State. Being refused accommodation on account of her color, in the cabin specially set apart for white persons, she instituted an action for damages under the Louisiana law, and the court held:

"There can be no doubt that the exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The River Mississippi passes through and along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the

exclusive legislative power of determining what regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well as those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all,
72 white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved, because he had been excluded on account of his color.

"This power of regulation may be exercises without legislation as with it. By refraining from action Congress, in effect adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adopt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in Welton *vs.* The State of Missouri, 91 U. S. 282, 'inaction (by Congress) is equivalent to a declaration that interstate commerce shall remain free and untrammelled.' Applying that principle to the circumstance of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him the power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute unless its unconstitutionality is clearly established, we think this statute to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress, and not from the States.

"We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect." 95 U. S. 489–491.

It will be noticed that the court expressly declined to consider the power of Congress over commerce on navigable waters, but rested its decision solely on the commerce clause of the Constitution.

Applying these principles to the case at bar, the contention of the defendants cannot be sustained, for the trains carrying the freight between the points named traverse for the largest part of the voyage outside of the State of Arkansas.

The Interstate Commerce Commission had the identical
73 question before it on two occasions and reached the conclusion that its jurisdiction extended over such shipments to the exclusion of the commissions of the States. The New Orleans Cotton Exchange *vs.* Cincinnati etc. R. R. Co. 2 Interstate

Commerce Comm. Rep. 375; Milk Producers' Association *vs.* Railroads 7 Interstate Commerce Rep. 92, 160. The later case was determined since the decision in the Lehigh Valley case which was by the commission distinguished after full consideration from a case like this.

In State *vs.* Chicago, etc. Railway Co. 40 Minn. 267, the facts were identical with those in this case, and the court says:

"The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato—a large part of which indeed, the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route including the transit of 148 miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the railroad and warehouse commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receivers this property within the State, and is to carry it through the foreign State to a destination within our own borders.

"In view of the above decisions of the Supreme Court of the United States, that the transportation of freight by a common carrier, apart from consideration of contract concerning the property as *as* between the shipper and the consignee, is a subject of 'commerce,' to which the Constitution applies, it is not a matter of controlling importance that the consignor and the consignee, or place of shipment and destination be within the same State, if the transportation is through a foreign State. Assuming that the Constitution places within the exclusive control of Congress the subject of transportation among the several States, let it suppose that a shipment is made from Duluth to Winona—both cities being within our State but upon the borders of Wisconsin—by route wholly within the latter State except, the inconsiderable distance of the depot grounds in those cities from the State line can it be said that this carriage of perhaps 200 miles through the State of Wisconsin, and of a mile
74 or two within our own borders, is domestic transportation and commerce, as distinguished from that which, under the Constitution, is to be deemed as being 'among the several States'? The Constitution, as interpreted by the court whose decisions upon this subject are final, has placed under the exclusive regulation of Congress the subject of transportation among the States, so far, among other things as relates to the matter of charges, in order that it may be protected from conflicting and adversely discriminating State legislation. See authorities above cited. Is not a case such as we have supposed, or the case now before us, transportation among the States, within this purpose of the Constitution, as really would be a shipment and transportation of goods from New York, Chicago, or Milwaukee to Minnesota, as to which unquestionably, under the decisions above cited, Congress and not the several States would have the power to regulate? We are unable to state any principle

which supports the relator's claim of jurisdiction to determine what charges may be made for the transportation of freight through the State of Wisconsin. Whether the result would have been different if the order had prescribed rates only with respect to some of the route as is within our own State we do not decide. The mere fact that Duluth and Mankato are both in this State, and that a part of the line of road of this respondent is also here, and operated under our law, cannot authorize our State authorities to regulate the operation of the 148 miles of road which is wholly within the State of Wisconsin, which there exists, and is managed, of course, under the laws of that State subject to the limitations as the National Constitution may impose."

In Gibbons *vs.* Ogden, Chief Justice Marshall in defining the word "among" in the commerce clause of the Constitution says:

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffics of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description." 9 Wheat. 194.

The test laid down by the Chief Justice as to what is not commerce among the States is:

"That commerce which is completely internal; which is carried on between man and man in a State, or between different
75 parts of the same State, and which does not extend to or affect other States." 9 Wheat. 194.

The court is of the opinion that upon the allegations contained in the bill, complainant is entitled to the relief asked, and the demurrer to the bill is overruled.

(Signed) JACOB TRIEGER, *Judge.*

Filed February 5th, 1901.

W. P. FEILD, *Clerk.*

And on the same day in accordance with the above opinion the following decree was entered:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. WELLS, Commissioners and Members of the Railroad Commission of the State of Arkansas. } 1336.

Final Decree.

On the 5th day of February, 1901, this cause having come on for hearing upon the bill of complaint and the demurrer of defendant

to the entire bill of complaint; having been argued by counsel on the part of the complainant and defendants respectively, and submitted to the court, upon the pleadings, viz: the bill of complaint and the demurrer of defendants thereto, and the arguments and briefs of counsel; and the court having duly considered the same and being fully advised in the premises, it is hereby ordered, adjudged and decreed that the demurrer of the defendants and each of them to
76 the bill of complaint, be and the same is hereby overruled, and that complainant have and recover its costs upon said demurrer incurred and expended, and have execution therefor; and thereupon on the same day defendants electing in open court to stand upon their demurrer, and admitting in open court that the facts were truly and correctly stated and set forth in the bill of complaint, and declining to plead further and announcing in open court that they elected to stand upon the demurrer to the bill of complaint; thereupon the case was submitted to the court for final decree upon the bill of complaint and the demurrer of defendants thereto, and the court being fully advised in the premises, and having heard the arguments of counsel for complainants and defendants, and having considered the same and their briefs submitted in support thereof, it is hereby ordered adjudged and decreed by the court, that the temporary injunction heretofore issued herein be and the same is hereby made perpetual, and that the defendants herein, Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of the State of Arkansas, and each of them and as such commissioners, their successors in office their agents and attorneys be and are hereby perpetually enjoined and restrained from in any manner interfering with or undertaking to exercise any authority whatsoever over any charges, tariffs or rates for freight made by complainant herein The Kansas City Southern Railway Company, for shipments from any point in the State of Arkansas, to any other point in the State of Arkansas or to any point in any other State or Territory, when any portion of such transportation shall be through the Indian Territory, or any other State than the State of Arkansas, and from undertaking to fix or determine
77 any such rates, tariffs or charges, and from undertaking to compel complainant The Kansas City Southern Railway Company, to in any manner respect or comply with rates, tariffs or charges for such shipments and transportation of freight as are now or may hereafter be made by said defendants acting in their official capacity, and from entertaining, hearing or determining any controversy between citizens of the State of Arkansas and said complainant The Kansas City Southern Railway Company, on account of any such rates, tariffs or charges for such shipments of freight made by the said complainant The Kansas City Southern Railway Company, and from citing complainant, The Kansas City Southern Railway Company to appear to a answer thereto or to any complaints or charges made by such citizens to or before said defendants acting in their official capacity on account of any such rates, tariffs or charges, or violations thereof and from investigating, directing or instituting any prosecution for penalties or otherwise

against said complainant The Kansas City Southern Railway Company, on account of such charges or violations thereof, and from making or attempting to make, any order or orders with reference thereto, or any of the foregoing matters and things herein enjoined and restrained.

It is further ordered adjudged and decreed that complainant have and recover its costs herein laid out and expended and have execution therefor.

(Signed) JACOB TRIEBER, *Judge.*

78 And on March 18th, 1901, the following proceedings were had to wit:

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs. } 1336.
FELIX M. HANLEY ET AL.

Come the defendants by Winchester and Martin Esqs., their solicitors and file herein their assignment of errors and prayer for appeal.

Which assignment of errors is as follows:

United States Circuit Court for the Western Division of the Eastern District of Arkansas.

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. WELLS, Commissioners and Members of the Railroad Commission of Arkansas. } 1336.

Assignment of Errors.

1. The court erred in overruling defendants' demurrer to the bill herein.

2. The court erred in rendering a decree against defendants in this cause.

(Signed) WINCHESTER & MARTIN,
Attorneys for Defendants.

Which prayer for appeal is as follows:

79 United States Circuit Court for the Western Division of the Eastern District of Arkansas.

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, HENRY W. Wells, Commissioners and Members of the Railroad Commission of Arkansas. } 1336.

Prayer for Appeal.

Defendants pray for an appeal to the United States Supreme Court from the decree rendered in this cause.

(Signed) WINCHESTER & MARTIN,
Attorneys for Defendants.

Appeal granted upon execution of a bond as required by law in the sum of two hundred and fifty dollars returnable in thirty days.

June 17th, 1901.

(Signed) JACOB TRIEBER,
U. S. Dist. — East. Dist. of Ark.

80 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas begun and holden on Monday the 1st day of April anno Domini, one thousand nine hundred and one, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. district judge, presiding and holding said court, the following proceedings were had, to wit:

JUNE 17TH, 1901.

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY ET AL. } 1336.

Come the defendants by Winchester and Martin, Esqs., their solicitors; and it appearing to the court that the prayer for appeal and assignment of errors were heretofore filed herein by the defendants on March 18th, 1901, but that no action was taken thereon it is now ordered that an appeal be and is hereby allowed to the United States Supreme Court from the decree rendered herein on February 5th, 1901, and that the amount of the bond on said appeal is hereby fixed at the sum of two hundred and fifty —, which bond is now presented and by the court approved.

Which bond is in words and figures following, to wit:

81 United States Circuit Court, Western Division of the Eastern District of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY, JEREMIAH G. WALLACE, and HENRY W. WELLS, Commissioners and Members of the Railroad Commission of the State of Arkansas. } 1336.

Know all men by these presents: That we Felix M. Hanley, Jeremiah G. Wallace and Abner Gaines commissioners and members of the railroad commission of Arkansas, and the undersigned sureties, are held and firmly bound unto The Kansas City Southern Railway Company the complainant in the full and just sum of two hundred and fifty dollars to be paid to the Kansas City Southern Railway Company its successors and assigns forever; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 18th, day of March, 1901.

Whereas lately at the October term A. D. 1900 of the circuit court of the United States for the western division of the eastern district of Arkansas, in a suit pending in said court, between said Kansas City Southern Railway Company complainant and the said Felix M. Hanley *et al.* defendants the demurrer of the said defendants to the bill of complainants was overruled and a decree was rendered against the said defendants and the said Felix M. Hanley *et als.* have obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation directed to the Kansas City Southern Railway Company citing and admonishing it to be and appear in the United States Supreme Court, sixty days after date of said citation.

82 Now the condition of the above obligation is such, that if the said Felix M. Hanley, Jeremiah G. Wallace, Abner Gaines, commissioners and members of the railroad commission of Arkansas, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(Signed) FELIX M. HANLEY,
ABNER GAINES,
Railroad Commissioners.
W. J. ECCOLS.
THOMAS C. DAVIS.

Approved:
JACOB TRIEBER, *Judge.*

And on June 25th, 1901, the following proceedings were had, to wit:

KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
FELIX M. HANLEY ET AL. } 1336.

Come the defendants by Winchester and Martin, Esqs., their solicitors and file herein their citation to the complainant which is signed by the court and service thereof acknowledged by the complainant.

Which citation is as follows:

83 The United States of America to the Kansas City Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court in the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the western division of the eastern district of Arkansas, wherein Felix M. Hanley, Jeremiah G. Wallace and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, — appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber judge of the circuit court of the United States for the eastern district of Arkansas, this 17th day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,
United States Distr. Judge, Presiding in Circuit Court for the Eastern District of Arkansas.

Service acknowledged.

LATHROP, MORROW, FOX & MOORE,
C. W. LUCAS,
READ AND McDONOUGH,
Attorneys for Appellee.

Endorsed: Filed June 25, 1901. W. P. Feild, clerk.

84 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, W. P. Feild, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office, and constitute a true copy of the record and the assignment of errors and of all proceedings in the case of The Kansas City Southern Railway Co. *vs.* Felix M. Hanley, *et al.*, &c.

The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.

In witness whereof, I have hereunto set my hand and the seal of said court, this third day of July, in the year of our Lord, one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-fifth.

Attest:

W. P. FEILD, *Clerk.*

Endorsed on cover: File No. 18,221. E. Arkansas C. C. U. S. Term No. 368. Felix M. Hanley, Jeremiah G. Wallace, and Henry W. Wells, commissioners and members of the railroad commission of Arkansas, appellants, *vs.* The Kansas City Southern Railway Company. Filed July 13th, 1901.

1018

No. 131.

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[illegible]

[illegible]

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15733

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901

No. 368

FELIX M. HANLY, JEREMIAH G. WALLACE AND HENRY W. WELLS, COMMISSIONERS AND MEMBERS OF THE RAILROAD COMMISSION OF ARKANSAS, APPELLANTS,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLEES.

ABSTRACT

On March 11, 1899, the Arkansas legislature passed an act providing for the regulation of freight and passenger traffic and the appointment of a railroad commission whose duties should be among other things to fix the rates of charges for freight and passenger traffic in Arkansas. This act also provided a penalty of not less than $500.00 and not more than

$3,000.00 for a violation of the rates fixed by the Commission, to be recovered in an action by the State's attorney.

In pursuance of the authority vested in them under said Act, the Commission fixed and published the rate of charges for the transportation of freight on the road of appellee, from Fort Smith, in the State of Arkansas, to Grannis, in said State, as well as to and from other stations on the line of said railway. The Fort Smith Chair Company delivered to appellee at its station at Fort Smith, Arkansas, a lot of chairs to be shipped over its line of railway to Grannis, Arkansas, and received from said railway a bill of lading for same. The transportation was continuous and at no time in the course of transit passed over the line of any other railway or out of the possession of appellee; it was one continuous shipment over the same line of railway. The point of origin and destination were both in the State of Arkansas, and the consignor and consignee were both citizens of the State of Arkansas. From Fort Smith, the point of origin, it passed one mile in the State of Arkansas, to the Indian Territory line, thence over the line of appellee's road through the Indian Territory 63.841 miles to the Arkansas State line, thence in the State of Arkansas 51.155 miles over the appellee's road to Grannis, the point of destination, in Arkansas. Appellee demanded and received from said Chair Company for said shipment an amount which exceeded the rate fixed by said Railroad Commission for the shipment of freight from Fort Smith, Arkansas, to Grannis, Arkansas, of $1.81. Thereupon the Chair Company filed with the Railroad Commission a complaint, setting up the over-charge made by ap-

pellee and asked that it be cited to appear before said Commission and show cause why it should not conform its rates of charges for shipments of the character named to the schedule of rates fixed by said Commission. Appellee appeared in response to said citation and interposed a plea to the jurisdiction of the Commission, alleging that the shipment constituted interstate commerce and not State commerce, and therefore, was not subject to the schedule of rates fixed by the Railroad Commission of Arkansas. Upon the hearing, the appellee's plea to the jurisdiction was overruled, the Commission holding that the shipment constituted State and not interstate commerce. (Record, pp. 24, 25, 26 and 27.) Thereupon the appellee filed a bill in the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, against the Board of Railroad Commissioners of the State of Arkansas. (Record, pp. 1 to 15.)

The allegations in the bill are, that the complainant (who is the appellee here), is a railroad corporation existing under the laws of the State of Missouri, owning a line of railroad and operating it as a common carrier of passengers and freight from Kansas City in the State of Missouri, to Ogden on the line dividing the States of Arkansas and Texas; that said railroad traverses parts of the following states and territories, to-wit: Missouri, Kansas, Arkansas and Indian Territory; that after leaving the State of Missouri it runs through the State of Arkansas for 28.649 miles, thence through the Indian Territory for a distance of 127.781 miles, then again in the State of Arkansas, which it traverses for a distance of 117.618 miles; that

it also has a branch line from Spiro, in the Indian Territory, to Fort Smith, in the State of Arkansas, fifteen miles of which is in the Indian Territory and one mile in the State of Arkansas; that it also owns other branches running from points in the State of Texas and Indian Territory for short distances to points in the State of Arkansas, and along which lines there are numerous stations from which freight is shipped; that whenever any freight is shipped from these stations to Fort Smith, or from Fort Smith to them, such shipments must, of necessity, pass over complainant's, appellee's, line of railroad extending through the Indian Territory, and to points in Miller County, Arkansas; that the defendants, appellants, who compose the Railroad Commission of the State of Arkansas, claim and assert under the authority of that State, the right to regulate the charges for carrying freight by the complainant, appellee, from and to places in the State of Arkansas, where the course of transportation is mostly through and over the Indian Territory, or the State of Texas, and threaten upon refusal of complainant, appellee, to comply with their schedule of charges, to visit it with the penalties prescribed by the laws of the State of Arkansas for violation of the orders of the Railroad Commission; that in pursuance of their alleged authority they have cited complainant, appellee, to appear before them and answer the complaint of the citizens of the State of Arkansas, by reason of the fact that complainant, appellee, charges for the transportation of freight from Fort Smith, Arkansas, to Grannis, in the same State, passing in the course of transportation through the Indian Territory for the largest portion of the trip, a rate in excess

of that prescribed by the Commission, although the shipment complained of was continuous from Fort Smith to Grannis, on a through bill of lading and moved in the State of Arkansas, etc., as already stated, one mile to the State line, thence, 63.841 miles in the Indian Territory to the Arkansas State line, thence in Arkansas 51.155 miles to the point of destination.

The bill further charges that complainant, appellee, does a large carrying business between the stations in the State of Arkansas, but which it must carry principally on the line of road in the State of Texas and the Indian Territory and if the defendants, appellants, are not restrained by injunction a large number of suits will be instituted against complainant, appellee, for the penalties prescribed by the law of the State, to the great detriment and irreparable injury of complainant.

The Circuit Judge issued a temporary injunction at the instance of the appellee upon the filing of its bill. (Record, pp. 28, 29 and 30.) Thereupon appellants filed a demurrer to appellee's original bill, which is as follows, to-wit:

The defendants by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth:

That the plaintiff has not in his said bill made or stated such a cause as entitles him, in a court of equity, to an injunction against these defendants, or either of them, or to any relief against these defendants, or either of them.

Wherefore and for divers other good causes of demurrer appearing in said bill, the defendants doth demur thereto, and humbly demanded the judgment of this court whether they shall be compelled to make any further answer to the said bill, and

prays to be hence dismissed with their costs and charges in this behalf most wrongfully sustained. (Record, p. 32.)

Upon the hearing, the court overruled the demurrer. (Record, p. 33 to 44) Appellants declined to plead further, but rested on their demurrer and filed the following assignments of error.

ASSIGNMENT OF ERRORS

1. The court erred in overruling defendant's demurrer to the bill herein.

2. The court erred in rendering a decree against defendants in this cause. (Record, p. 46.)

And prayed an appeal to the Supreme Court, which was granted. (Record, p. 47.)

BRIEF

The authority conferred upon the commission will be found in the Acts of Arkansas of 1899, at page 82, and more particularly in Sec. 9 of said acts at page 86, which is as follows:

Section 9. That every person or corporation operating any railroad or express business in this State is hereby required to furnish said commission, within fifteen days after notice to do so, with the rate sheet and tariff charges for transportation of every kind over such railroad, it shall be the duty of said commission to examine and revise said rate sheet and tariff charges for freight or express matter for each railroad in this State, and determine whether or not, and in what manner, if any, such charges and rates are more than just and reasonable compensation for the services rendered, and whether or not and in what manner, if any, said charges and rates are in violation of any of the provisions of this act; and said commission will make reasonable and just rates of freight, express and passenger tariffs to be observed by all persons and corporations operating any

railroad or engaged in transporting persons or property as express or freight in this State; shall make rules and regulations as to charges at any and all points for the necessary hauling and delivering of express and freight; regulate rates and charges for such service on all railroads as, in their judgment, justice to the public and said person or corporation may require; and so make the same conform to the requirements of this act. And said commission, in making such rules and regulations, shall first give the person or corporation to be effected thereby notice to appear and show cause, if any it can, why no change should be made in the rates then in force, and shall take into consideration the character and nature of the service to be performed, the entire earnings of any railroad or express company, the expense of operating the same, and the income and value thereof. And when any tariff of charges is corrected and approved, said commission shall append a certificate of its approval to said tariff of charges and give notice thereof to any officer or agent of the railroad or express company to be effected thereby, and said tariff and charges shall be kept posted up for at least five days before the same shall go into effect. And said commission shall accordingly fix rates and tariffs of charges for those express companies and railroads, the officers of which fail to furnish rate sheets or tariffs of charges as above required. Said commission shall not alter or change any tariff or charges so approved by it except upon ten days' notice in writing to the person or corporation operating the express company or railroad to be effected by such change, giving the same an opportunity to be heard; such notice to be by delivering a copy thereof to any officer or agent of such person or corporation.

The question raised by the demurrer, in short, is, whether a shipment in bulk, for one continuous passage over a single line of railroad upon a single bill of lading from a point in Arkansas to another point in Arkansas, but passing out of the State into the Indian Territory and thence back into the State

in course of transportation, both consignor and consignee being residents and citizens of the State of Arkansas, constitutes domestic, or inter-state, commerce.

The Constitution of the United States, Article 1, Section 8, provides: "The congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

It has been held that the power of congress to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations and among the several States and Indian tribes."

In the earlier adjudications commerce seemed to be limited to the buying and selling of commodities, but since the decision in the case of *Gibbons v. Ogden*, *9 Wheaton 1*, *22 Law Ed.*, *23*, a broader and more comprehensive meaning has been given the term. In construing the commerce clause of the constitution Mr. Chief Justice Marshall says, speaking for the court: "It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. * * * The subject to which the power is next applied is to commerce among the several States. The word 'among' means intermingled with, a thing which is, among others, is intermingled with them."

In the same opinion the Chief Justice says: "It is not intended to say that these words comprehend the commerce which is completely internal, which is carried on between man and man in a State, or between different points of the same State, and which does not extend to or affect other States. * * *

* * * Comprehensive as the word 'among' is, it may very properly be restricted to *that commerce which concerns more states than one*. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language of the subject of the sentence, must be the exclusive internal commerce of a State. The genius and character of the government seems to be that its action is to be applied to all external concerns of the nation, and those internal concerns which affect the states generally and not to those which are completely within a particular State which do *not affect other states*, and with which it is not necessary to interfere for the purpose of extending some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Gibbon v. Ogden, 22 Law Ed., U. S. Repts., 69.
Western Union Tel. Co. v. Texas, 105 U. S., 460; 26 Law Ed., 1067.

Before passing to the proposition as to whether the shipment in question is State or interstate commerce, we wish to call the Court's attention to the fact that not only transportation by rail and water have been held to be commerce, but

since the broader interpretation given the term in *Gibbon v. Ogden*, all the agencies used in commercial intercourse have been held to be included in the term commerce.

In *Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1; 24 Law Ed., 708*, the court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of congress under the commercial clause of the Constitution just as railroad companies or navigation companies.

Ratterman v. Western Union Tel. Co., 127 U. S., 411; 27 Law Ed., 229.
Western Union Tel. Co. v. Texas, 105 U. S., 460; 26 Law Ed., 1067.

These were cases wherein the power of the State to tax telegraph messages was brought into question and the court held in these and many similar cases that the telegraph was an instrument of commerce and that the different states had control over this character of commerce, where it did not affect other states.

In a long list of cases, too numerous to particularize, the Supreme Court of the United States has held that commerce carried on by boat, whether navigating the high seas or upon the navigable rivers of the United States, is under control of Federal and not State authority, and that too, even though the transportation is between points in the same State. One of the leading cases on this subject is that of *Lord v. Steamship Co., 102*

U. S., 541. This case states the proposition most favorable to the appellee, and is a case of transportation from a point in California to another point in the same State. We will designate these cases as navigation cases, for they are the exception to the rule laid down in both the adjudicated cases and the text books, that commerce between points in the same State, though incidentally passing through the territory of another state is domestic as distinguished from interstate or foreign commerce. The reason for the distinction is clearly stated in the opinion of the court delivered by Mr. Chief Justice Waite in *Lord v. Steamship Co., supra*, as follows: "The Pacific Ocean belongs to no one nation, but is the property of all mankind. When, therefore, the Venture went out from San Diego or San Francisco on her several voyages she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character was recognized and she was subject to such laws as the commercial nations of the world had by usage or otherwise agreed on for the government of vehicles of commerce occupying the same common property of mankind. She was navigating among vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently was engaged with them in commerce. If, in her navigation, she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done; in every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations and as such she and the business in which

she was engaged was subject to the regulating power of Congress."

Hence, it will be seen that the conclusions reached by the court were upon grounds entirely different from those applicable to the case at bar. In the Lord Steamship case the rights and liabilities of other nations were brought into question. They were not rights personal to California or her citizens. The navigation had to do and dealt with external concerns, and brought other interests into consideration. In cases of this kind it was said by Chief Justice Fuller, in *Lehigh Valley Railroad Co. v. Commonwealth of Penn., 145 U. S., 192; 36 L. Ed., 673*: "It was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question." In referring to the amendment to the maritime law and the power of congress to regulate maratime matters, in *Ex-parte Boyer, 109 U. S., 629, 27 Law Ed., 1056*, it was held that: "Admiralty jurisdiction extended to a steam canal boat in case of collision between her and another canal boat while the two boats were navigating the Illinois and Lake Michigan Canal, although the libellant's boat was bound from one place in Illinois to another place in the same State;" but, as already stated, the principle is not the same in these cases, or in this class of cases, as the one we have under consideration. The United States controls and retains jurisdiction over its navigable rivers, as well as the ocean and lakes upon its borders, for obvious reasons, and no analogy can be drawn between commerce carried on them, whether from point to point in the same State or between States and nations, and that of a common carrier of freight or passengers

by railroad, or of telegraph companies engaged in commerce. We have found two cases. There may be others which sustain the plaintiff in its contention that a shipment of freight from a point within a State to another point within the same State, is interstate and not State commerce and they are the cases found in *40 Min., 267*, and *The Milk Producers' Ass'n case in 7 Interstate Commerce Reports, 92*. The former was decided prior to the decision of the Supreme Court of the United States in *Lehigh Valley Railroad Company v. Commonwealth of Pennsylvania, 145 U. S., 192*, and the latter since said decision. The Interstate Commerce Commission in the latter case undertaking to distinguish the case before them from that of the Lehigh Valley case, their reasoning may be clear to the conrt, but they fail to advance an argument for their decision which, in our judgment, is not directly opposed to the views of the Supreme Court in the Lehigh Valley case and we had supposed that the Interstate Commerce Commission was controlled by the Supreme Court and not the Court by the commission.

We have undertaken to show the Court that the navigation cases are not in point, and also to show that the cases decided prior to the Lehigh Valley case, *supra*, have been overruled by the judgment of the court in that case, and we now submit to the court that the decisions since the Lehigh Valley case holding to plaintiff's contention have been by subordinate courts and not by the Supreme Court of the United States, and not, therefore, an argument to this court, much less controlling upon it.

But permit us now to call the Court's attention to the adjudicated cases holding with the Arkansas Commission in their views that the case before us is State and not interstate commerce. The leading case on the question is the Lehigh Valley case cited above and the question involved in that case was whether the State of Pennsylvania could levy a tax upon the gross earnings of a railroad for freight carrid from Mauch Chunk, Penn , to Phillipsburg and Trenton, N. J., and thence back into the State of Pennsylvania, by one continuous carriage, though over the line of another railroad. Mr. Chief Justice Fuller in speaking for the court says: "There was no breaking of bulk or transfer of passengers in New Jersey. The point of arrival and the point of departure were alike in Pennsylvania. The intercourse was between these points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line into the soil of another State?

"If it has happened that through engineering difficulties, as the interposition of a mountain or river, the line is deflected so as to cross the boundaries and run for the time being in another state than that of its principal location, does such a detour itself impress an external character on internal intercourse?"

Further on in the same opinion, the Chief Justice said: 'It should be remembered that the question does not

arise as to the power of any other State than the State of the *termini*. * * It is simply whether in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another state renders the business foreign which is domestic. *We do not think such view can reasonably be entertained* and are of the opinion that this taxation is not open to constitutional objections by reason of the particular way in which Philadelphia was reached from Manch Chunk."

The holding in this case has never been modified, so far as we are aware, by any decisions of the Supreme Court of the United States, and the State courts have uniformly, since the opinion was delivered, followed it, with the single exception of the *Milk Producers' case in 7 Interstate Commerce Reports, supra* However the counsel for plaintiff may differentiate the Lehigh Valley case they can not get away from the proposition that the Supreme Court in that case said, by an undivided court, that the carriage of freight between two points in the same State with incidental passage over another State does not make the business interstate commerce, nor does it deprive the State of power and contol over it. It is not material whether the question was decided in a case of taxation or a case of regulation of freight charges, for before a conclusion could be reached by the court, the question must be determined whether it was state or interstate commerce, and upon identically the same state of facts as those upon which this suit is based, the court held it to be domestic and not foreign or interstate commerce.

The Supreme Court of New York has held to the same opinion in the case decided as late as January, 1897.

Dollon v. Erie Railroad Co., N. Y. Miscellaneous Reports, Vol. 19, p. 116.

Interstate Commerce Reports, Vol. 7, Add. XXXVII., wherein the court says: "Transportation from one point to another in the same state, with incidental passage through the territory of an adjoining state, is not interstate commerce subject to the regulation of Congress." The Supreme Court of Iowa has held the same doctrine in *Campbell v. Chicago, St. Paul, etc., R. R. Co., 86 Iowa, 587; 17 L. R. A., 443.* This was an action brought by the Railroad Commission of Iowa v. the Chicago & C. R. R. Co. to collect for an overcharge made on a shipment of cattle from Beloit, Iowa, to Sioux City, Iowa. The railway of defendant railroad company from Beloit to Sioux City, Iowa, was 67 miles long, but in passing between the two points nearly half of the distance was over its track in the State of South Dakota. Robinson, C. J., delivering the opinion of the court said, in referring to the Lehigh Valley case, *supra*, "It was held that such transportation was not interstate commerce * * * * Since the question under consideration is a Federal one, the decision last cited is decisive of it. Following that decision, we hold that continuous transportation of articles of commerce from Beloit to Sioux City over the line of railway described is *not* interstate commerce."

The Supreme Court of North Carolina hold the same view.

State vs. Western Union Tel. Co., 113 N. C. 213; 22 L. R. A., 570.
Leavell v. Western Union Tel. Co., 116 N. C. 211, (27 L. R. A., 843.)

We have already called the Court's attention to the fact that the telegraph is as much an instrument of commerce as a railroad and that telegraph messages constitute commerce just as much as freight or passengers on railroads. The facts in the case decided in 113 N. C. were as follows: The Western Union Telegraph Company had a line running from Elizabeth City, North Carolina via Berkley and Norfolk, Virginia, to other points in North Carolina, the railroad commission in North Carolina fixed the rates of charges for messages between points in the State notwithstanding the fact that messages went into the State of Virginia and back into North Carolina in course of transit, the Telegraph Company fixed a rate in excess of the rate fixed by the commission, claiming it to be inter-state commerce not under the control of the commission, and the suit was brought to enforce the commission's rate of charge. The Court said:

"It appears from the findings of fact that the shortest and only route over the wire of defendant by which messages can be transmitted to many points in this State, necessarily traverse in part the State of Virginia and thence back into North Carolina, and it is insisted that such messages so trans-

mitted are interstate commerce, and, therefore, not subject to the tariff regulations of the commission * * * it is plain that such business does not relate to the intercourse of citizens of this State, with those of some other State; it is purely an intercourse between the citizens of North Carolina through the means afforded by a corporation having extensive faculties of communication within the limits of said State, and the uniform rates fixed by the commission for the business which the said corporation accepts, or is under legal obligation to accept, in no wise affect or interfere with any business which the defendant undertakes for any citizen of Virginia, either between themselves or with the citizens of other States. Neither are we able to see how the mere fixing of rates between different points in this State can in any way conflict with any regulation which the State of Virginia may have the power to impose in respect to its domestic business. It must be manifest, therefore, that this business is without a single feature of interstate commerce, etc., * * *''

The same question has been before the Supreme Court of Missouri in

Scammon vs. K. C. & C. R. R. Co., 41 Mo. App. 194.

Seawell vs. K. C. & C. R. R. Co., 119 Mo. 224, 24 S. W. Repts., 1002.

The case decided in 119 Mo., 224, is in every respect similar to the case we have under consideration. The facts in this case were that the K. C., F. S. & M. R. R. Co's. road ran

from Carbon Center, Liberal and Minden to Kansas City points in the State of Missouri, but the greater portion of the road lay in the State of Kansas, the distance from Carbon Center to Kansas City is about 24 miles less than the distance from Liberal, but notwithstanding this fact, and in violation of the rates for freight fixed between these points by the Railroad Commission of Missouri, the railroad company were charging $2.00 more for the short haul than for the long, claiming that notwithstanding the fact that the point of origin and destinaton were both in the State of Missouri, it was interstate commerce, and not subject to the rate fixed by the commission. In this case the Court said, "Here the State of Missouri has undertaken to regulate transportation by rail between points in the State only, and the Supreme Court of the United States has never held that this was interstate commerce, even where such continuous transportation was partly through the limits of another State, but to the contrary." And in speaking of the ruling of the Court in the Lehigh Valley case the Court said, "It would seem that this ruling is directly in point in the present case, when it is remembered that the question here is not as to the power of any other State than the State of the termini, nor as to the regulation of the operation of the defendant or any other companies' road elsewhere than in Missouri."

In the case of the *United States ex rel Kellog et al v. Lehigh Valley R. Co*, decided by the United States District Court, Western District of New York, *115 Fed. Rep., 373*, as late as April, 1902, the court held that a shipment of grain over a single railroad between two points within the same State was not

an interstate shipment although the line of railroad between the terminal points passes through other states.

The Court will find a very able discussion in Elliott on Railroads, Sec. 690, wherein the author says:

"The power to regulate domestic or intra-state commerce resides in the States. The States may make such regulations as they deem expedient or politic for the government of commerce within their own borders; provided, that the regulations do not violate the Constitutional provision. If the place from which the passengers or property are transported and place to which they are carried are both within the territorial limits of the same State, and the carriage is continuous, then the transportation is not interstate commerce, although in course of carriage the passengers or property may on line of transportation pass through the borders of that State. To the rule that when both the passengers or property are received and the places of destination are within the territorial limits of the same State is interstate commerce and subject to State regulations, there is an exception, and that exception is this: If the *carriage* is over the *high seas*, although from place to place in the same State, it is interstate commerce and cannot be regulated by the State."

And again, at Section 1671, says this same author:

"Any commerce which crosses a State line and concerns more States than one is interstate commerce, but unless more than one State is concerned or the transit is in part over high seas, the commerce is not interstate, although a State line is crossed, for commerce which entirely originates and wholly

ends in one State is domestic commerce, notwithstanding the fact that in the transit, a State line is crossed. If, however, the transit is from one State to another, the commerce is interstate, and commerce is not domestic commerce when it is over the high seas."

Counsel for the Railroad Company argue, that if the Indian Territory authorized a certain amount to be charged for the transportation of freight within its borders, and the Arkansas Railroad Commission should fix a different amount between points in Arkansas, but passing in course of transportation over a part of the Indian Territory; that if the rate fixed by the Arkansas Commission should govern, it would be taking from the Indian Territory the right to govern its own internal affairs as guaranteed under the Constitution.

We answer in reply to this argument that the authorities have held without exception that a shipment of freight from Texas, for example, through the Indian Territory and on into Missouri, is not under the control of the Indian Territory, nor will the Indian Territory rate govern in a shipment of this kind, and for what reason? Because it is interstate commerce and the power to regulate such commerce is reserved under the Constitution in Congress.

Now, on the other hand, a shipment from Fort Smith, Arkansas, to Grannis, Arkansas, but passing through the Indian Territory has been held by the Supreme Court of the United States in passing upon a similar proposition in the Lehigh Valley case, to be the domestic commerce of Arkansas,

and therefore not subject to the regulating power of the Indian Territory.

The point we make is, that the Indian Territory has no control over interstate commerce or the domestic commerce of another State, and whether the shipment in controversy is interstate or the domestic commerce of Arkansas, no rates of freight or regulations of the Indian Territory could apply to it, for Congress would control in the one instance and the State of Arkansas in the other, and the illustration of counsel for the railroad company of the rates of freight allowed to be charged by the Indian Territory for shipments therein could not apply to a shipment of this character, for it is not claimed that this is the domestic commerce of the Indian Territory.

In other words, the only way that the proposition of counsel could be applicable would be for this character of shipment to be the domestic commerce of the Indian Territory, and on this point there is no contention.

As we have already undertaken to show the court both the adjudicated cases and the text books hold that a shipment of the character of the one under consideration is the domestic commerce of Arkansas; if it is, the rates fixed by the Indian Territory could no more affect it than they could affect interstate commerce, for the power of each within its constitutional limits is supreme.

If, in determing this question, the Court finds that no other State is concerned in a shipment like the one involved in the ruling of the Railroad Commission of Arkansas, except the

State of Arkansas, then the demurrer to plaintiff's bill must be sustained, for the shipment would then be State and not interstate commerce.

In *Coe v. Errol, 116 U. S., 517; 29 Law Ed., 715.* "Logs cut in Maine and detained at Errol, New Hampshire, on the way down the Androscoggin River to Lewiston, Maine, were held by the Supreme Court of New Hampshire not taxable at Errol.

Thus fixing the principle that mere passage over the soil of another State than that of the origin and termini of the shipment, gives the State over whose soil the transportation is had no jurisdiction or control over such commerce.

For the reason stated we think the demurrer should be sustained.

Respectfully submitted,

WINCHESTER & MARTIN,

Attorneys for Defendants

C. E. WARNER,
of Counsel.

No. 131.

FILED
DEC 8 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 2

134

STATEMENT AND BRIEF ON BEHALF OF APPELLEE.

—IN THE—

Supreme Court of the United States.

FELIX M. HANLEY, JEREMIAH G. WALLACE, HENRY W. WELLS, Commissioners and Members of the Railroad Commission of the State of Arkansas, *Appellants*,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellee*.

No. 368.

Statement, Brief and Argument of Appellee.

STATEMENT.

The Kansas City Southern Railway Company, as disclosed by the Bill of Complaint, is a railway corporation organized and existing under and by virtue of the laws of the State of Missouri, and owns or controls, maintains and operates a line of railroad extending from Kansas City, Missouri, to Ogden, on the dividing line between the States of Texas and Arkansas (pp. 1 and 2 Transcript). Between Kansas City and Ogden the road traverses the States of Missouri, Kansas, Arkansas and Indian Terrtitory (p. 2 of Transcript).

Said railroad after reaching the northern line of the State of Arkansas runs through the counties of Benton

and Washington therein, a distance of 28.65 miles, to the dividing line between Arkansas and the Indian Territory; thence 127.78 miles through the Indian Territory to another point on the dividing line between the State of Arkansas and the Indian Territory, where the Indian Territory adjoins the county of Polk in the State of Arkansas. It also has a branch running from Spiro in the Indian Territory to Ft. Smith in the State of Arkansas, of which branch fifteen miles is within the Indian Territory and one mile within the State of Arkansas. After passing through the Indian Territory said railroad extends through Arkansas a distance of 117.618 miles to the Red River, where said railroad connects with the Texarkana & Ft. Smith Railway, and by connections as set forth in the bill of complaint, a continuous route is provided to Port Arthur in the State of Texas (p. 2 of Transcript).

The line of railroad through the Indian Territory was built under the authority granted to The Kansas City, Pittsburg & Gulf Railroad Company by an Act of Congress approved February 27, 1893, and was formerly the property of the Kansas City, Pittsburg & Gulf Railroad Company. This ownership included that portion of the line of railroad in the Indian Territory and Arkansas as aforesaid (p. 6 Transcript). By a public sale (through foreclosure proceedings) the property has been acquired by complainant, The Kansas City Southern Railway Company (pp. 5 and 6 Transcript). On the said line of railroad located in the Indian Territory there are various stations and depots to the number of thirty and on said line of railroad in said Indian Territory there are four junction points where passengers and freight are exchanged and transferred from

other lines of railroad to that of The Kansas City Southern Railway Company (pp. 3 and 4 Transcript).

On the 29th day of May, A. D. 1900, the Fort Smith Chair Company made a shipment of chairs from Fort Smith, Arkansas, to Grannis, Arkansas, over the railroad of the Kansas City Southern Railway Company, said shipment going via Spiro, Indian Territory, the distance it transversed being 52.155 miles in Arkansas and 63.841 miles in the Indian Territory, for which The Kansas City Southern Railway Company received $5.26 as freight charges (pp. 2 and 11 Transcript). The said Fort Smith Chair Company filed a complaint before the railroad commission of Arkansas, stating that an overcharge had been made by The Kansas City Southern Railway Company on said shipment to the amount of $1.81 (p. 25 Transcript). On the 14th day of August, A. D. 1900, said railroad commission rendered upon said complaint an opinion in favor of said Fort Smith Chair Company, and therein decided that said shipment was a domestic shipment of the State of Arkansas; that it was not an interstate shipment or of that nature; that the said commission had jurisdiction over the rate therefor and that said The Kansas City Southern Railway Company had been guilty of overcharging the said Fort Smith Chair Company to the amount of $1.81. The Commission further held that the said Railway Company was liable to prosecution for the statutory penalty for such overcharge. The Commission further held in effect, that it had jurisdiction over and the right to fix rates for all shipments from point to point in the State of Arkansas, where, in the course of transportation, the shipment passes through the Indian Territory (pp. 24 to 27 Transcript). A

petition for rehearing was filed by said Railway Company before said Commission.

On the 3d day of October, A. D. 1900, said Railroad Commission overruled said petition for rehearing and ordered said Railway Company to comply with and maintain the rates established by said Railroad Commission from points in Arkansas to other points in Arkansas, when a shipment passes through a portion of the Indian Territory or any other state than the State of Arkansas (pp. 27 and 28 Transcript). On the 3d day of October, A. D. 1900, The Kansas City Southern Railway Company filed its bill of complaint herein to enjoin the said Railroad Commission and the members thereof from enforcing said order (p. 1 Transcript), and on the 5th day of October, 1900, a temporary injunction was issued against the defendants from enforcing said order and from interfering with or undertaking to regulate the rates to be charged for shipments of the kind aforesaid (p. 28 and 29 Transcript).

The facts set forth and alleged in the bill of complaint were admitted by the defendants. A general demurrer to the bill was filed. (p. 32 Transcript). Thereafter the case was argued and submitted upon the bill and demurrer. The demurrer was overruled and a decree rendered upon the bill in favor of the complainant Railway Company and a perpetual injunction was granted against the defendants which appears in full in the printed record (pp. 44 and 45 Transcript). Defendants have brought the case to this Court by appeal.

The question involved is one of law. If the shipment in question constituted commerce *exclusively under the jurisdiction of Congress*, then the decree of the trial Court should be affirmed.

BRIEF AND ARGUMENT.

I.

Question Presented.

Upon the facts set forth in the bill the question presented is whether the shipment in question constituted *domestic commerce of the State of Arkansas or whether it was commerce wholly and exclusively under the jurisdiction of the Congress of the United States,* and conventionally termed inter-state commerce.

If it were domestic commerce of the State of Arkansas, then that State, through its officials, duly authorized, had jurisdiction over it and control of it. If on the other hand it were commerce exclusively under the jurisdiction of Congress, it was beyond the reach of any law, commission or power of the State, and the State could not regulate the rates governing it. The contention of the Railway Company is that it was commerce *under the exclusive jurisdiction of Congress;* that the State of Arkansas could not control it or make rates to govern it; that the attempt of the Arkansas commission to do so was the exercise of an unlawful and unwarranted power; that an injunction was properly granted to restrain the attempt of the Arkansas commission to regulate or control the rates for such commerce and that the demurrer to the bill was properly overruled.

II.

Distinctions Between Different Kinds of Commerce.

In the argument in the trial Court frequent use was made of the expressions, "Commerce," "Inter-State Commerce" and "Intra-State Commerce." We will, however,

use in preference and as better illustrating the distinctions to be borne in mind, the expressions, *"Domestic Commerce" of the States* and *"Commerce under the exclusive jurisdiction of the Congress of the United States."* When commerce falls under the definition of "domestic" commerce the States have jurisdiction, and when it does not fall under that definition the States have no jurisdiction—whether the commerce should properly be styled *Inter-state* Commerce or commerce under the exclusive jurisdiction of Congress. Our contention is that all commerce which is not domestic *within each State* is commerce under the jurisdiction of Congress, whether the appellation of "inter-state" can with strict propriety of language be applied or not, and that in order to prevent the exercise of State jurisdiction over the same, it is sufficient to demonstrate that the commerce is *not domestic*. It is indisputable that the power to regulate commerce rests either in the States or in the Congress of the United States. No State, however, can make a law having any force beyond the boundaries of that State, and consequently no State can make a law and command obedience thereto *on any soil other than its own*.

A course of conduct happening elsewhere than within the State of Arakansas, even though it be expressly contrary to the provisions and policy of the laws of Arkansas, cannot be punished, regulated, controlled, or governed by the State of Arkansas. For this reason the State of Arkansas can have no jurisdiction over a rate charged for transportation *performed upon the soil of the Indian Territory*. Nor can any other State have such jurisdiction. *Consequently, the jurisdiction must rest in the only other depository of power to regulate at all*. In either such event, however, Arkansas is entirely without jurisdiction or power.

These are the considerations which impel us to contend that it is sufficient to show that the commerce in question is not domestic commerce, whether it is to be termed in the strict sense of the term *inter-state* commerce or not. It may be a little awkward to term the commerce in question *inter-state*, because it moves from a State into a Territory, and not into another State, but whether it is strictly appropriate or not to call it *inter-state* commerce, all the principles and reasons which serve to distinguish inter-state from domestic or intra-state commerce likewise serve to distinguish the commerce in question from the domestic commerce of the State of Arkansas, because inter-state commerce—*an expression not found in the Federal Constitution—is only a name of convenience by which to designate a commerce which moves over the soil of different jurisdictions, and over which neither of such individual jurisdictions has any power or control.*

To all intents and purposes the commerce in question is inter-state commerce or of that nature, and will be so dealt with. The above suggestions, however, will serve to show the applicability of the navigation cases hereinafter cited, and which, upon argument in the trial Court, were contended by counsel for the commission to have no application *because* they were not strictly inter-state commerce cases.

The fact that commerce moving over or across different jurisdictions ceases to be commerce of the jurisdiction in which the voyage began, so soon as it passes beyond the boundaries of that jurisdiction, even though destined to another point therein, is the underlying principle of the navigation cases, and hence it must be manifest that the doctrine is applicable to the case at bar, which

differs only in the fact that the Indian Territory is composed of land instead of being a portion of the high seas. *The Territory, however, is equally with the high seas beyond the jurisdiction of any State of the Union, and is under the exclusive jurisdiction of Congress.*

III.

History of Commerce Clause.

The provision of the Constitution in question is as follows:

"The Congress shall have power * * * to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

Of this provision it has been well said by Mr. Prentice in his most admirable work entitled: "Commerce Clause of the Federal Constitution," page one: *"This is all save what may be found by implication."*

Commerce Clause of the Federal Constitution, (by Prentice & Eagan), page 1.

A review of the cases arising under this clause readily shows the great importance and wisdom of the provision. The element of discord among the States under the Articles of Confederation, growing out of the attempts of individual States to impose burdens for their own separate benefit upon inter-state commerce, was the most urgent cause giving rise to the calling of the Constitutional Convention. Mr. Madison, in paper number 42 of the Federalist, spoke upon this matter as follows: as follows:

"The defect of power in the existing confederacy, *to regulate the commerce between its several members,* is in the number of those which have been clearly pointed out

by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete and ineffectual. *A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter.* Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the article of import and export, *during the passage through their jurisdiction,* with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured, by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

The necessity of a superintending authority over the reciprocal trade of confederated States, has been illustrated by other examples as well as our own. In Switzerland, where the union is so very slight each canton is obliged to allow to merchandise a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany, it is a law of the empire that the princes and States shall not lay tolls or customs on

bridges, rivers, or passages, without the consent of the emperor and diet; though it appears from the quotation in an antecedent paper, that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been forseen here. Among the restraints imposed by the union of the Netherlands on its members, one is, that they shall not establish imposts advantageous to their neighbors, without the general permission.

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; *to reconcile a partial sovereignty in the union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part and letting the whole remain.*"

See Federalist Number 195 to 197, Edition of 1842.

The original call of the Virginia House of Delegates in 1784, for a meeting of deputies from all the States, recited as the only proposed duty of such delegates, the following:

"To take into consideration the trade of the United

States; *to examine the relative situations and trade of the said States;* to consider how for a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as when unanimously ratified by them, *will enable the United States* in Congress, effectually to provide for the same."

See Journal of Constitutional Convention, by Madison, Vol. 1, p. 36 (Scott Ed.).

Under this call, commissioners from only five States assembled, but public sentiment had so developed and been so stimulated, as Mr. Madison says, by the effect of the contemplated object of the meeting, that these delegates recommended to the States a Convention *with powers adequate to the occasion.* In recommending such convention, they said: "Deeply impressed, however, with the magnitude and importance of the object confided to them on this occasion, your commissions cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken to effect a general meeting of the States in a future convention, *for the same* and such other purpose as the situation of public affairs may be found to require. * * * In this persuasion, your commissioners submit an opinion that the idea of extending the powers of their deputies to other objects than those of commerce, which had been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future convention. They are the *more naturally led to this conclusion,* as in the course of their relations on the subject, they have been induced to think that *the power of regulating trade is of such comprehensive ex-*

tent, and will enter so far into the general system of the Federal Government, that to give it efficacy and to obviate questions and doubts, concerning its precise nature and limits, may require a corresponding adjustment of other parts of the Federal System."

Journal of the Constitutional Convention, Vol. 1, p. 39.

Mr. Madison says, in speaking of the defects in the Articles of Confederation:

"The same want of a general power over commerce led to an exercise of the power, separately, by the States which not only proved abortive, but engendered rival, conflicting and angry relations."

Journal of Constitutional Convention, p. 46.

And further says, in closing a review of the weaknesses of the Articles of Confederation:

"Such were the defects, the deformities, the diseases and the ominous prospects, *for which* the convention *were to provide a remedy and which ought never to be overlooked* in expounding and appreciating the constitutional charter, *the remedy that was provided."*

Journal of the Constitutional Convention, Introduction, p. 48.

The importance and prominence of this same subject was not wanting upon the opening of the Convention. Mr. Randolph, in the first address made therein, and speaking of the character of the government to be formed, said:

"The character of such government ought to secure, first, against foreign invasion; *secondly, against dissentions between members of the Union."*

Journal of the Convention, Vol. 1, p. 60.

In enumerating the deficiencies of power under the confederacy, he said, among other things, that:

"The Federal Government could not defend itself against *encroachment from the States.*"

Journal of the Convention, Vol. 1, p. 66.

The importance in the minds of the commissioners of the power *to regulate commerce,* again *appears in the first draft of the proposed constitution submitted to the convention by Mr. Pinckney,* in which there was provided to be given to Congress the power to "regulate commerce with all nations *and among the several States.*"

Journal of the Convention, Vol. 1, p. 66.

The subject might profitably be pursued through the entire record of the convention. It seems to have been a subject which commanded a common obedience, and its consideration seems to have been for the purpose of putting beyond cavil, *an exclusive superintending control in the Congress of the United States of that particular class of commerce, viz: Inter-state Commerce, previous attempts to deal with which by individual States had given the chief cause of complaint which inspired the calling of the convention.*

With so much of history to guide, it would seem that there ought to be no hesitation in denying to a State the power to regulate *that commerce which crosses the boundaries of the State and in pursuing its destination traverses the soil of a separate jurisdiction and over which the first State has no authority whatever.* Originally, there was no such hesitation, as evidenced by the decision of the first case in which the commerce clause of the constitution was presented for consideration, viz: The case of *Gibbons against Ogden.* This clause of the constitu-

tion has, however, held equally as conspicuous a place in the deliberations of the judicial tribunals of the country as it held in the Constitutional Convention, and among the causes giving rise thereto.

IV.

Multiplicity of Decisions.

It would be impossible in this brief, without extending it far beyond reasonable bounds, to review the judicial evolutions through which this clause has passed in the matter of interpretation.

Mr. Prentice, in his work above quoted, points out that the construction of this clause was before the Supreme Court of the United States only five times prior to 1840. In 1860, the number of cases had increased to twenty. In 1870, the number was thirty. In 1880, the number was seventy-seven. In 1890, one hundred and forty-eight; while at the present time, the number is considerably upwards of two hundred. In the United States Circuit, District and State Courts, the number of cases involving construction of this clause, reaches almost fourteen hundred.

Commerce Clause of the Federal Constitution (By Prentice & Egan), p. 14.

In this list of cases are to be found many different shades of opinions. Sometimes are found contradictory opinions. There are many dissenting opinions. Some opinions were scarcely delivered before modified or overruled. However, the final outcome of this multitude of cases and variety of opinions seems to be a well defined rule that in the regulation of commerce not domestic (that is commerce not confined within the bounds of a single

State), the Congress of the United States is vested with the *exclusive power*. This is the doctrine of the *earliest and the latest cases.*

V.

Apparent difficulty of the case at bar.

The seeming difficulty in the present case will be found, upon careful consideration, to have no real existence. It arises from the fact that the shipments of freight are from a beginning point to an ending point both in the same State. This, it is contended, makes the commerce domestic and under control of the State within which both points are situated, *notwithstanding the fact that in its journey the freight passes out from that State and into and through another jurisdiction during the greater part of the distance of transportation.* It is contended that inasmuch as the shipment is from a citizen at one point in Arkansas to another citizen at another point in Arkansas, that it is commerce between citizens of the same State, and hence domestic in its nature. It should be observed, however, that the language of the constitution deals *only* with a matter *among States;* while the transactions from which Inter-state Commerce usually follows as a conclusion are dealings between citizens of different States, *the recorded history of the Constitutional Convention shows that the commerce clause of the Federal Constitution did not have its origin in any design to protect dealings between such citizens, but in the manifest necessity of preventing the exercise on the part of the States of State authority over commerce that was not domestic, that is, wholly within the State.*

It was the matter of State power and the evils of the exercise thereof that the convention considered. *It*

was not primarily individual interests which were deliberated upon, but the effect upon the commercial development of the country if commerce, in crossing State lines, could at every boundary be burdened by taxation which each of the States might impose, by assertion of that sovereignty which they had not yielded under the Articles of Confederation. The adoption of the clause was a concession of the rights of States, and not of individual rights. It was the exercise of the sovereign rights of individual States which created the evils sought to be remedied. The exercise of the rights of individuals or citizens of individual States could never have created the evils. The power whose exercise annoyed was a power inherent in the political organism of the State as such and not in its individual citizens. Oppression and retarding of commerce by State power was the evil to be cured, and the conclusion was the deprivation of the power of the States to the extent necessary to make commerce, which crossed State lines, absolutely free from State interference. It will not do, therefore, in the light of history, to determine whether commerce is domestic or inter-state by the criterion of dealings between citizens of the same State or between citizens of different States. *The test should be whether it is that commerce which, before the adoption of the Federal Constitution and under the Articles of Confederation, could have been interfered with by taxation or imposition of duties by each individual State into whose territory it entered or over whose soil it crossed.* If it be that class of commerce, then it is that commerce which the Federal Constitution has put beyond the reach of the individual State and over which it deprived the individual State of the power of control.

It need, therefore, only be inquired whether the com-

merce is of that kind upon which the different States might, under the Articles of Confederation, have imposed burdens in order to be permitted to enter or cross their respective territories. If it be, then it is the kind of commerce sought to be and intended to be guarded from State interference by the clause of the constitution in question.

VI.

"Indian Territory" Compared with "States."

If the Indian Territory were a State it could not regulate rates for the passage of the traffic in question across its soil. If it could, its regulation would be confined to that part of the transportation within its boundaries. So the State of Arkansas would, in its regulation, be confined to that part of the same traffic within its boundaries. *Each State would then be independently regulating a portion of the same traffic.* This would be an illustration of the very evil sought to be cured by the commerce clause of the Federal Constitution. Can it make any difference, because the Territory is not a State? Certainly not. The principle is the same, whether it be a State or Territory. The Territory is a jurisdiction separate and distinct from that of Arkansas, and the State of Arkansas has no more right to invade that jurisdiction, because it is under the Federal Government, than it would have to invade it if it were under the jurisdiction of a State of the Union equally independent as the State of Arkansas.

The word, "State," is only a conventional term to designate a defined political organism. *The intention of the framers of the Constitution was to prevent the exercise of the power of different jurisdictions over the same commerce, or different portions thereof. They aimed to*

prevent transportation from being divided into parts by the lines of different jurisdictions and interference with such divided portions by the different jurisdictions whose boundary lines had marked such division.

VII.

Definitions.

Having in mind the evils existing under the Articles of Confederation, in regard to commerce which traversed different jurisdictions, and aiming to prevent them, the Constitutional Convention provided that the Congress of the United States should have the power to regulate commerce "among the several States."

The word "regulate" means "to [illegible]ist by rule." It is synonymous with "rule," "manage," "govern."

> See Century Dictionary and 'Cyclopedia, word "regulate."

"Commerce," says Chief Justice Marshall, in *Gibbons* v. *Ogden* (9 Wheat.), undoubtedly is *traffic, but* it is something more, it is *intercourse.*

"Among" is defined to mean "*in or into the midst of. In association or connection with.*"

> See Century Dictionary and 'Cyclopedia, word "among."

Paraphrased into the language of these definitions the clause in question would read that Congress shall have power to rule or govern that traffic and intercourse which moves in or into the midst of or is associated or connected with several States.

The transportation in question certainly moves into the midst of the Indian Territory. In conducting it, intercourse is necessarily had with the Territory and its peo-

ple; the traffic and intercourse is necessarily associated and connected with the Indian Territory. So quickly as the shipment crosses the line of the Territory it begins to move upon the soil of the Territory. It then moves freely among the people of that Territory in the absence of Federal regulations. It is subject to local laws of inspection, if any exist there; to quarantine laws, if any exist there, so far as they are intended purely to prevent the spread of contagious disease. It is subject to the police power of the local jurisdiction which it enters. It is subject to charges to defray expense of inspection and of quarantine regulations of the local jurisdiction. On this point we refer to the work of Mr. Prentice where a compilation of the authorities will be found.

See Commerce Clause of the Federal Constitution (By Prentice & Egan, Chap. V, pp. 146 to 150).

In the case of *Hannibal & St. Joseph R. R. Co.* v. *Husen*, the Court held a statute of the State of Missouri invalid which provided that between the first day of March and the first day of November of each year, no Texas, Mexican or Indian cattle should be brought into the State. The ruling was because the statute was a prohibition between those dates of all inter-state commerce on cattle of the description mentioned, regardless of their actual condition. The Court used the following language:

"While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health or property *within its borders*, while it may prevent persons and animals suffering under contageous or infectious diseases, or convicts, etc., from entering the State; while, for the purpose of self protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the

State, *beyond what is absolutely necessary for self protection.*"

95 U. S. 465, *The H. & St. Joe R. R. Co.* v. *Husen.*

The Railroad Company conducting the traffic through the Territory is subject to the laws governing the Territory as to crossings and connections with other railroads therein. It is also subject to the law of the Territory which requires all passenger and freight trains to stop at all intersections with other roads and to receive at such points and carry all passengers and freight offered, and also to deliver at such points all passengers and freight destined to such points.

See Indian Territory Statutes 1899, Chap. 62, Sec. 3646.

This applies also to trains engaged in inter-state traffic and has been so decided. 166 U. S., 427, *Gladson* v. *Minnesota.*

It is therefore manifest that in conducting the traffic in question *there is and must be an intercourse with the Indian Territory and that such traffic is carried on and conducted into the midst of the Territory.* Suppose then that Congress should fix the rate per mile for transportation over the soil of the Indian Territory, and that such rate was different from that established by the Arkansas Commission for the same mileage. Here would be a conflict. Which would govern? Will it be contended that Congress would have no power to do so? Certainly not. Will it be contended that because Congress has not done so, Arkansas may? Certainly not, because *the non-action of Congress does not give to Arkansas the right to so act.* If Congress fixed a rate for the mileage in the Territory, it certainly would supercede that fixed by any other power, even if the other power had a right to act in the

absence of action by Congress, which, however, it has not. In that event we would have *a rate split into parts*, and different portions regulated by different jurisdictions; *whereas the Supreme Court, as we will see later, has said that a rate is a unit.* This would be the old difficulty over again, and which the Constitutional Convention sought to remedy.

VIII.

Character of a Rate.

The fixing of a rate, however, is not an arbitrary matter. It is not subject to the caprice of any power. It is well settled by this Court that the authority having the power to fix a rate must fix a reasonable rate, and the elements to be consulted in fixing a reasonable rate are equally well determined.

Upon this question this Court has said:

"In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property *wholly* within its limits must be determined without reference to the inter-state business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation considered alone, upon the ground that the carrier is earning large profits on its inter-state business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its inter-state business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on inter-state business, nor the latter the losses on domestic business."

169 U. S. (466) 541, *Smyth* v. *Ames.*

The Court, speaking further of the power of the State to prescribe rates, said:

"When it undertakes to prescribe rates not to be exceeded by the carrier, *it must do so with reference exclusively to what is* just and reasonable, as between the carrier and the public *in respect of domestic business.*"

169 U. S. *supra*, page 541.

In order to determine a reasonable rate, the Court further held that there must be considered the following matters, viz:

(1). The original cost of construction.

(2). The amount expended in permanent improvements.

(3). The amount and market value of its bonds.

(4). The present as compared with the original cost of construction.

(5). The probable earning capacity of the property under the particular rates prescribed by statute.

(6). The sum required to meet operating expenses.

169 U. S. *supra*, p. 547.

If, then, these elements are to be considered, and the determination of rates so far as a State is concerned, is to be confined to domestic business, how can the State of Arkansas undertake to determine rates for transportation *over territory other than its own?*

For example, what concern has the State of Arkansas with cost of construction in the Indian Territory, or with the amount spent for permanent improvements therein, or the probable earning capacity of the mileage within that Territory, or the amount required to meet operating expenses therein?

What right has it to inquire about these matters pertaining to the Indian Territory? It must, however, con-

sider in fixing a rate, elements of the character above mentioned, *but the mandate of this Court to the State is, you must do that at home, with respect to your own territory, within the bounds of your own jurisdiction and not beyond it.*

A rate, however, is a unit. It cannot be split into parts. It must be determined as an entirety. One jurisdiction cannot fix *one part of it* and another jurisdiction fix *another part of it.* Such is the decision of this Court.

118 U. S., 557, *Wabash &c Ry. Co.* v. *Illinois.*
169 U. S., 471, *Smyth* v. *Ames.*

Speaking upon the same subject *and illustrating the unity of a rate and the elements to be considered in determining it,* Judge Grosscup of the Northern District of Illinois, used the following language:

"There can be no doubt that to Congress is given, by the constitution, the absolute power to regulate commerce between the States. This power, independently of legislation, is not necessarily exclusive of the rights of the States to reasonably regulate such incidents of inter-state commerce, lying within their respective jurisdictions, as wharves, pilots, harbors, roads, bridges, etc. A wharf, harbor, or bridge, lying within a State is a tangible entity, over which the laws of the State extend. The cost of their creation and the expense of their maintenance make the imposition of tolls or charges not only reasonable, but necessary. These must be enforced by and subject to some law, and, in the absence of congressional legislation, there is no law except that of the State. The application of State law in such cases is not inconsistent with the general power conferred upon Congress, and does not introduce into commerce between the States either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other States upon wharves, harbors and

bridges within *their* territorial limits. *But the fixing of a rate for the carriage of goods from one State to another is not simply an incident of, or appurtenant to commerce, but is the very core and essence of inter-state commerce.* It is not a physical entity within the limits of a State, and it cannot be subject to regulation in one State without coming into interference with the equally rightful regulations of other States, and thus producing hopeless contradiction and confusion. How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio or Pennsylvania? The reasonableness of such rate depends, among other things, upon the cost of construction and wages paid beyond her jurisdiction; the amount of capitalization allowed, and taxes and assessments exacted, by other jurisdictions; the terms of contracts for the interchange of freight between carriers, made and allowed under the laws of other States; and the amount of traffic carried, which may, in turn, be affected by the laws of the other States governing the acquisition of, or consolidation with other lines. These, and many others, are the elements of the cost of carriage, and before the reasonableness of a rate can be determined, the cost must be ascertained. The reasonableness of rates for such long distances, and over different methods of conveyance, can only be approximately ascertained, at best, by men of special learning and equipment in such matters. Is it possible that the constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line 1,000 miles long? *I am of the opinion that a rate for the carriage of Inter-state Commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business and interpretations of the laws of different States, is essentially a national affair, and its regulation is therefore exclusively national. The rate of carriage is the heart pulse of commerce, and can be subject safely to a single course of restraint only. Many restraints, themselves entirely different* and inconsistent with each other, *would destroy the*

very possibility of uniformity or fixedness of rates. It follows, therefore, that in my opinion the local municipal law of the several States is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these."

58 Fed., *Swift* v. *Philadelphia and Reading R. Co.*, (858) 860.

In reviewing the decisions upon this question, Mr. Prentice, in his treatise on the commerce clause of the constitution, uses the following pertinent language:

"If one State might regulate *with reference to mileage the charges* to be made by inter-state carriers for transportation within its limits, *another State might regulate the charge with reference to expense*, and the result might be that the carrier would be so limited in the several States through which it operated that he would not collect for the whole service a total charge which would be reasonable under the laws of all States. It is, therefore, well settled that a State may not regulate inter-state rates."

Commerce Clause of the Federal Constitution (By Prentice & Eagan), p. 284.

IX.

Power Over Territories.

The power over territories, in every respect, resides *exclusively* in the Congress of the United States. The Territory is the property of the United States, and not under the jurisdiction in any respect of any State. No power other than Congress or a territorial government by its permission, can make any regulation or pass any law affecting a Territory. It certainly does affect a Territory if a rate can be prescribed by another power to govern transportation over its soil, transportation which passes

into the midest of its people, and which by so doing, subjects itself to all those local laws relating thereto, which the Territory by permission of Congress has, in like manner as a State, the right to enact and which are not within the meaning of the constitution as to regulation of commerce among the States.

Upon the question of *exclusiveness* of the power of Congress over the Territories, we refer to the following decisions of this Court and the provision of the Federal Constitution. Said constitution provides as follows:

"The Congress shall have power to dispose of *and make all needed rules and regulations* respecting the Territory or other property belonging to the United States."

Article 4, Section 3.

An opinion by Chief Justice Marshall contains the following language:

"Perhaps the power governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

1 Pet., (541) 543, *American Ins. Co. et al.* v. *356 Bales of Cotton.*

In another case decided by this Court, the following language was used:

"The constitution of the United States (Article 4, Section 3), provides 'that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The term territory as here used is merely

descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, *and this power is vested in Congress without limitations* and has been considered the foundation upon which the territorial governments rest."

14 Pet., (534) 538, *U. S.* v. *Gratiot.*

Chief Justice Waite, in the case of *National Bank* against *County of Yankton,* said, in the year 1879:

"It is certainly now too late to doubt the power of Congress to govern the Territories. There has been some differences of opinion as to the particular clause of the constitution from which the power is derived, but that it exists has always been conceded. * * * *All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.* The territories are but political subdivisions of the outlying domain of the United States."

The Court further held that such power was " an incident of sovereignty."

101 U. S., (129) 133, *National Bank* v. *County of Yankton.*

In a still later case this Court used the following language:

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States."

136 U. S., (1) 42, *The Late Corporation of the Church of Jesus Christ of Latter Days Saints* v. *United States.*

Upon another occasion this Court, speaking of the laws of the Territories and having under consideration at the time the Territorial laws of Minnesota, said:

"The authority and effect of the Territorial laws of Minnesota upon the subjects within the legitimate bounds or cognizance of that Territorial Government, no person, it is presumed, will be disposed to question."

20 How., (558) 561, *Irvine* v. *Marshall, et al.*

Upon another occasion this Court held:

"That in case of a conflict between the organic act creating the Territory and any act of Territorial legislation, the act of Congress must prevail."

132 U. S., 632, *Clayton* v. *Utah.*

Other similar decisions have been made, and we quote the following from the syllabus of the case of the *United States* against *Coxe:*

"The Cherokee Nation are so far under the protection of the laws of the United States that they may be considered, for the purpose above named, *as a State or Territory* of the United States."

18 How., 100, *The United States to the use of James Mackey, et al.* against *Coxe.*

Further, as showing the power of the Territory to legislate and pass laws affecting persons and property within its bounds, and to regulate matters pertaining thereto so far as such laws do not intrench upon the exclusive powers of the Federal Congress, we quote the language of Chief Justice Chase, as follows:

"The theory upon which the various governments, for portions of the Territory of the United States, have been organized, has ever been that of leaving to the inhabitants all the powers of self government *consistent* with the supremacy and supervision of national authority

and with certain fundamental principles established by Congress."

13 Wall., (434) 441, *Clinton* v. *Englebrecht.*

In view of these authorities it seems to us that it would be idle to contend that the Indian Territory could not make and pass local laws *so far as Congress permitted,* which equally with similar laws passed by a State would control and govern as to matters of public health, like quarantine laws, as to matters of inspection, as to the speed of trains, as to stoppage of trains, both freight and passenger, at stations, as to connections with other railroads, and other matters *where such laws did not interfere with the power of Congress* to regulate commerce among States, *and if this be true, it would seem that the Indian Territory must be held to be affected by transportation through its limits equally as is a State by transportation through its limits, and that thus commerce moving across the Territory is intermingled with the Territory and its people and produces intercourse with the Territory within the definition of inter-state commerce as defined in the case of Gibbon against Ogden, reported in the 9th Wheaton, which will be spoken of hereafter.* It also seems clearly manifest, from the foregoing authorities, that there can be no question but that the exclusive power over the Territory resides in the Congress of the United States, and that no single State can pass any law or make any regulation that will affect commerce in any way while it is passing over or across the Territory.

X.

Specific Reservation by Congress over Rates in Indian Territory.

When the Kansas City, Pittsburg & Gulf Railroad Company, the predecessor of complainant, sought to enter and construct its road upon the soil of the Indian Territory, Congress, in like manner as it had done in the grants to other railroad companies, made special provisions in regard to the matter of rates, *and expressly asserted its right to regulate all rates.* This certainly shows that Congress holds that the power to regulate rates of transportation over the soil of the Indian Territory *is exclusively in it.* The language used is as follows:

"That said Roalroad Company shall not charge the inhabitants of said Territory a greater rate of freight than the rates authorized by the laws of the State of Arkansas for services or transportation of the same kind, *provided,* that passenger rates on said railroad shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railroad, and messages on said telegraph and telephone *lines until* a State Government shall be authorized to fix and regulate the cost of transportation of persons and freight within its respective limits by said railroad; but Congress *expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company, whenever such transportation shall extend from one State into another,* or shall extend into more than one State; *provided, however,* that the rates of such transportation of passengers, local or inter-state, shall not exceed the rates above expressed; and *provided, further,* that said Railroad Company shall carry the mail at such price as Congress may by law provide, and until such rate is fixed by law the Post Master General may fix the rate of compensation."

U. S. Statutes at large, Vol. 27, p. 487.
Act of Congress, February 27, 1893.

The language used clearly manifests an intention on the part of Congress to keep within its power the right to regulate all rates *within the limits* of the Indian Territory. In other words, *Congress, by the act, asserts not only that it has in the Indian Territory the same power over domestic rates as a State would have which could be created out of the Indian Territory, but that as to commerce affecting the Indian Territory not purely domestic, it has the exclusive power over it in like manner as it has over commerce among the several States.* So far as commerce is concerned, relative to the States of the Union, the declaration of Congress in the above act places the Territory upon the same basis as a State. It says in effect, that the State of Arkansas can no more regulate commerce or transportation in the Territory than it could if the Territory were a State. It also asserts that when a State shall have been created out of the Territory it shall be limited in power to the regulation of rates *within its limits.* The language is:

"Congress hereby reserves the right to regulate the charges for freight and passengers on said railroad * * * *until a State Government shall be authorized to fix and regulate the cost of transportation of persons and freight within its respective limits.*"

This statement is in accord with the decisions of the Courts. *If, however, the State created out of the Indian Territory, could not regulate rates for transportation across the State of Arkansas, how can it be contended that the State of Arkansas can have such power as to its neighboring State, and if Arkansas could not have such power as to another State, why can it be said to have it with regard to the Indian Territory, when the only difference in the situation is that the power over such rates now rests in Congress instead of a State?*

Upon argument in the trial Court, is was suggested by counsel for appellants that the shipments in question did not constitute inter-state commerce, because they were between citizens of the same State, namely, citizens of the State of Arkansas. This, however, is no test; if it were, then a shipment from John Jones in the State of Arkansas *to himself* in the State of Missouri would not be inter-state commerce, and a shipment from John Jones, a citizen of Arkansas, from one point in Arkansas to John Smith, a citizen of Missouri, to another point in Arkansas, and where the transportation was performed wholly within the State of Arkansas, would be inter-state commerce. This is absurd. The expression, therefore, between citizens of different States, it will be readily seen, is no guide. The expression "between different States," sometimes found in the books, clearly fails as a guide; as for example, the "State of Arkansas" might make a shipment consigned to the "State of Missouri" from a point in Arkansas to another point in Arkansas, and the transportation might be wholly performed in the State of Arkansas, but this would not be inter-state commerce. It is manifest that in order to have inter-state commerce something more is necessary than a transaction between citizens of different States or between different States, *and as heretofore shown, commerce becomes inter-state when, and only when, it is carried in or into the midst of a State other than that of its origin.*

XI.

Criticisms of Decisions Upon which the Arkansas Commission Predicated its Decision.

Before proceeding to the citation of the cases which support the contention of appellee, we will refer to the cases relied upon by the Arkansas Railroad Commission for the decision which gave rise to the present controversy. That decision is made to depend upon the following cases:

9 Wheat., 1, *Gibbon* v. *Ogden;*

145 U. S., 192, *Lehigh Val. Rld. Co.* v. *Pennsylvania;*

119 Mo., 222, *Sewell* v. *K. C., Ft. S. & Mem. Rld. Co.;*

113 North Car., 213, *State* v. *Western U. Tel. Co.;*

116 North Car., 211, *Leavell* v. *Western U. Tel. Co.;*

86 Iowa, 587, *Campbell* v. *C. M. & St. P. Ry. Co.;*

53 N. W., 151, *Campbell* v. *C. M. & St. P. Ry. Co.*

The case of *Gibbon* v. *Ogden* is one upon which we rely as an authority for our contention, and of this we speak later. An examination of the other said cases will disclose that all of them depend upon and were decided after the case of the *Lehigh Valley Railroad Co.* v. *State of Penn.*, reported in 145 U. S., beginning on page 192. If the Lehigh Valley Railroad Co. case cannot be made an authority for the opinion of the Arkansas Commission, no help can be obtained from the Iowa case or Missouri case or the two North Carolina cases, because they proceed upon the basis of the Lehigh Valley Railroad

case, and were decided upon the strength of the opinion in that case. Said Lehigh Valley Railroad case was decided by this Court on May 2d, 1892. The Missouri case relied upon in the opinion of the Arkansas Railroad Commission was decided December 23d, 1893. The Iowa case relied upon in said opinion was decided October 24th, 1892. The first North Carolina case relied upon was decided November 21st, 1893, and the second North Carolina case relied upon was decided April 2d, 1895. The Missouri case is reported in Volume 119, Missouri Supreme Court Reports, beginning on page 222, and is entitled *Seawell et al.* v. *Kansas City, Ft. Scott & Memphis Rld. Co.* In that case the Court refers to the decision of the Supreme Court of the United States in the Lehigh Valley Railroad case and upon page 240 states that it regards this decision of this Court as decisive of the question under consideration.

The Iowa case is reported in volume 86 of the Iowa Reports, beginning on page 587, and is entitled *Campbell et al. Railroad Commissioners* v. *Chicago, Milwaukee & St. Paul Ry. Co.* Upon page 590 of the opinion the Court refers in specific terms to the opinion of this Court in the said Lehigh Valley Railroad case and depends upon it as an authority for its opinion.

The first North Carolina case relied upon is that of *State ex rel. Railroad Commission* v. *Western Union Tel. Co.,* and will be found reported in Southeastern Reporter, volume 18, beginning on page 389. Upon page 391 of said volume the Supreme Court of North Carolina refers specifically to the opinion of this Court in said Lehigh Valley Railroad case, and depends upon it as an authority for its decision.

The second North Carolina case relied upon is entitled *Leavell* v. *Western Union Tel. Co.*, and will be found in the 21st Southeastern Reporter, beginning on page 391, and the Court upon said page 391 of said Reporter expressly refers to the opinion of this Court in said Lehigh Valley Railroad case, and depends upon it for its decision.

It seems, therefore, only necessary to consider the Lehigh Valley Railroad case itself. It will be found reported in the 145 U. S., beginning on page 192; the language of the Court in stating the facts is as follows:

"The Lehigh Valley Railroad Company is a corporation, which owns and operates an extensive system of railroads in that State, but has no line of its own to Philadelphia. For the traffic from Mauch Chunk to Philadelphia it makes use of two routes, one by the way of the Philadelphia & Reading road, being wholly within the State, and the other by its own line connecting with the lines of the Pennsylvania Railroad at Phillipsburg, N. J., and thence via Trenton, in that State, to Philadelphia. The detailed reports of its receipts show that the passenger traffic of the Lehigh Valley Company to Philadelphia from Mauch Chunk, is almost wholly taken over the Philadelphia & Reading, while its coal and general freight traffic reaches Philadelphia by the other road. Phillipsburg, N. J., lies across the Delaware River opposite Easton, Pennsylvania. By the running arrangements between the Lehigh Valley and Pennsylvania Companies, the transportation of other freight and passengers is continuous from Mauch Chunk to Philadelphia. The receipts named in class two are *confined* to that part of the transportation from Mauch Chunk to Phillipsburg, and *the taxation to the mileage wholly within the State* of Pennsylvania, and the question is whether *this taxation* in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from

Mauch Chunk by way of Trenton, N. J., amount to a regulation of inter-state commerce."

We respectfully submit that the Lehigh Valley Railroad case *is a case purely of taxation and therefore has no bearing upon and ought not to be applied to the question of the power of a State to fix and regulate a rate for the transportation of freight or passengers.*

We further submit that the case is an authority only for the taxation by a State of receipts of transportation *for that portion thereof performed wholly within the limits of the State imposing the tax.* It will be observed that in the statement upon which the State of Pennsylvania made the settlement with the Railroad Company for the taxes there is set forth as the first item the gross receipts and there is set forth as the *second item the proportion thereof taxable in the State of Pennsylvania.*

See page 192, 145 U. S.

The language of the opinion clearly shows that it was not intended to declare that a State had the right or power to tax said gross receipts *or to regulate inter-state commerce by laying taxes upon receipts derived therefrom.* The Court says, page 200:

"And while inter-state commerce cannot be regulated by a State by the laying of taxes thereon in any form, yet *whenever the subjects of taxation can be separated so that which arises from inter-state commerce can be distinguished from that which arises from commerce wholly within the State,* the distinction will be acted upon by the Courts and the State permitted to collect that arising upon commerce *wholly within* its own territory."

It will therefore be observed that the entire doctrine of the Lehigh Valley Railroad case and the language therein used *was with reference to the question of taxa-*

tion and the question whether there could be a taxation by the State upon a portion of the Railroad Company's receipts ascertained by the proportion of mileage wholly within the State imposing the tax. *The entire doctrine of the case is simply that a State may without violating the Constitution of the United States in regard to the regulation of commerce impose a tax upon that portion of the railroad receipts earned by and derived from mileage wholly within the State. The case limits the exercise of State power to that which happens wholly within the limits of the State. It does not permit the State power to affect anything beyond the limits of the State.* It allows to be determined for the purpose of taxation, the amount of receipts earned within the State upon the proportion of the mileage wholly within the State to the mileage of the total transportation. This is the full extent of the doctrine and we respectfully submit that the case *is no authority upon the question of the power of a State to determine and fix a rate for the transportation of freight or passengers, and is only an authority in regard to the matter of taxation.*

We further submit that *the question of taxation and the question of fixing a rate are two totally different things* and that the doctrine of the one should not be applied to the doctrine of the other.

Taxation depends upon the needs and necessities of the State, but a rate for transportation depends upon the right to charge reasonable compensation for a service performed. Taxation also is capable of apportionment as indicated by the cases, *but a rate is a unit,* an entire thing, as decided by this Court.

If it be undertaken to apply the doctrine of the Lehigh Valley Railroad Company case to the case at bar, then it would simply go to the extent of authorizing the State of Arkansas to fix a rate for that proportion of the transportation in question determined by the mileage wholly within the State of Arkansas. This, as elsewhere shown, cannot be allowed, for it would be a return to the very evil sought to be prevented by the commerce clause of the Constitution, namely, allowing different jurisdictions to fix different portions of the same rate. The doctrine that a rate is a unit wholly excludes the matter of a rate from the application of the doctrine of taxation.

The Lehigh Valley Railroad decision passed under the review of the Inter-state Commerce Commission, in a decision rendered on March 13, 1897, in case of *Milk Producers' Protective Association* against *Delaware Lakawanna Railroad Company, et al.* In regard to the Lehigh Valley Railroad decision the Commission used the following language:

"We have carefully examined and considered the Lehigh Valley decision with a view of determining whether it is actually controlling as claimed by counsel. The case involved the right of the State of Pennsylvania to tax the receipts of the Lehigh Valley Company from traffic shipped from points in that State but passing through New Jersey in the course of transportation, so far *as such receipts arose from service over the Lehigh Valley mileage within the State of Pennsylvania.* There was no dispute as to the amount of the tax and the only question raised was, whether the State could lay a tax upon the business at all. The Supreme Court upheld the validity of the tax involved. Whatever other or broader application may be given to language used or principles considered by the Court in that case, the decision *was con-*

fined to the question of taxation on what was done or earned within the State."

7 Inter-state Com. Reports, page (92) 160-161.

Milk Producers Protective Association against The Delaware Lackawanna & Western Railroad Company, et al.

The same distinguishing feature of the Lehigh Valley case is pointed in the work of Messrs. Prentice & Eagan.

See Commerce Clause of Fed. Const. (By Prentice & Eagan), page 90.

XII.

The Commerce in Question is Interstate Commerce.

We assert that in order for commerce to be domestic commerce of a State the transportation must not only begin and end within the same State but that the entire transportation must be within that State. See the following authorities:

19 Fed., (679) 702, *Louisville & N. R. Co.* v. *Railroad Commission of Tenn.;*

18 Fed., (10) 13, *Pacific Coast Steamship Co.* v. *Board of Railroad Commissioners;*

102 U. S., (541) 543, *Lord* v. *Steamship Co.;*

41 N. W. Rep., (1047) 1048, *State ex rel Rld. Commissioners* v. *C., St. P., M. & N. Ry. Co.;*

7 S. E. Rep., (836) 837, *Sternberger* v. *Cape Fear & Y. V. R. R. Co;*

7 Interstate Com. Reports (92) 160-161, *Milk Producers Protective Association* v. *Delaware & Lackawanna Railroad Company;*

2 Inter-state Com. Reports, 375, *New Orleans Cotton Ex.* v. *Cincinnati, N. O. T. P. R. Co.;*

95 U. S., 485, *Hall* v. *DeCuir;*
24 U. S. Stat. at Large, 379 (*Inter-State Com. Act*).

In the case of the Louisville & Nashville Railroad Company against Railroad Commission of Tenn., above cited, the Court, speaking of the rights of the State to exercise power over transportation, say:

"*If it be domestic transportation wholly within the State, they may;* nor does is cease to be wholly within because the thing transported has come from without, nor because is may be destined to go, ultimately, beyond the state; *but the particular transportation for which the charge is made must be wholly within the State. If it be partly within and partly without, the State cannot regulate* that within and leave the Federal power to act upon that without, *but has no control whatever over the charges for such transportation.* It is in the very nature of the thing itself not local or of domestic concern, and the States have no more power by such a construction or characterization to regulate the rates by the uniform legislation suggested by the section of the act just quoted (the local law) than they have to so regulate the rates of postage or the weights of coins. That Congress refrains from establishing such uniform regulation only indicates an expression of the Federal will that the rates shall be left to regulate themselves under the ordinary economic laws that govern the commerce between the States."

Supra 19 Fed., page 702.

In the case of *Pacific Coast Steamship Company* v. *The Board of Railroad Commissioners,* above cited, and where the transportation was from San Francisco to San Diego, in California, and was by vessel which in the voyage passed beyond the distance of a marine league from the shore, the Court said:

"Nor are the vessels engaged in purely domestic commerce when their voyages *between ports of the same State require them to navigate the ocean.* When they go beyond the marine league they pass out of the jurisdiction of the State, and come under the exclusive control of Congress. *To bring the transportation within the control of the State,* as part of its domestic commerce, *the subject transported must be within the entire voyage, under the exclusive jurisdiction of the State.*"

Supra 18 Fed., page 13.

In the case of *Lord* against *Steamship Company,* which was likewise a transportation by vessel between the ports of San Francisco and San Diego, California, Mr. Chief Justice Waite used the following language:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but *engaged only in the transportation of goods and passengers between ports* and places in the same State. It is conceded that, while the Ventura carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes, (Constitution, Article 1, sec. 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and Territory of that State, and *do not affect other Nations or States or the Indian Tribes.*"

The Court further said:

"Commerce includes intercourse, navigation, and not traffic alone. This was also settled in *Gibbons* v. *Ogden.* Commerce with foreign Nations, says Mr. Justice

Daniel for the Court, in *Veazie* v. *Moor*, (14 How., 568) must signify commerce which, in some sense, is necessarilly connected with these Nations, transactions which either immediately or at some stage of their progress must be extra territorial.

The Pacific Ocean belongs to no one Nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navagation which was necessarily connected with other Nations. While on the ocean her national character only was recognized, *and she was subject to such laws as the commercial Nations of the world had*, by usage or otherwise, *agreed on for the government of vehicles of commerce occupying this common property of all mankind.* She was navigating among the vessels of other Nations and was treated by them as belonging to the country whose flag she carried. *True, she was not trading with them, but she was navigating with them, and consequently with them she was engaged in commerce."*

Supra 102 U. S., pages 543, 544. *Lord* v. *Steamship Co.*

In the case of New Orleans Cotton Exchange, above quoted, the Commission used the following language:

"All commerce is subject to regulation, that *wholly within a State* and subject to its sovereign power by the State; that among the States and with foreign Nations and not *wholly within the sovereign* power of any one State by the United States, for the reason that to be effectual, regulation must be uniform, at least not conflicting. Commerce between Shreveport and New Orleans, while crossing on the ferry between Delta, La., and Vicksburg, Miss., is not subject to regulation by the State of Louisiana. The business of transferring freight by the ferry between the two States is Inter-state Commerce. *Gloucester Ferry Co.* v. *Pa.*, 114 U. S., 196, 1 Inter-state Commerce Report, 382.

While passing through Mississippi after passing from Louisiana, this commerce is Inter-state, and subject alone to Inter-state regulations. It is not subject at any place between Shreveport and New Orleans to regulation by both the State and the Congress. It passes by continuous carriage from Louisiana to, and through the State of Mississippi. It is not transportation *'wholly within one State.'* It is subject to regulation by the provision of the Act to Regulate Commerce; and the Commission had jurisdiction to revise the rates when the parties interested in them are before it."

2 Inter-state Commorce Reports, 375. *New Orleans Cotton Exchange* v. *Cincinnati, &c., Rld. Co.*

In the case of Milk Producers' Protective Association above quoted upon this same subject, and also dealing with the Lehigh Valley case, the Inter-state Commerce Commission said:

"The Supreme Court called attention in that decision to the fact that the case *was one of taxtion and not one of direct regulation, citing Pacific Coast Steamship Co. v. Board of Railroad Commissioners,* 9 Sawyer, 253, as indicating the distinction. In the case so cited the California Commission sought to regulate commerce between ports of that State when carried by a line of vessels navigating the Pacific ocean more than a marine league from the shore. Mr. Justice Field, sitting as Circuit Justice and writing the opinion said, 'to bring the transportation within the control of the State as part of its domestic commerce *the subject transported* must be *within the entire voyage under the exclusive jurisdiction of the State.* That decision seems to rest entirely upon the Commerce clause in the Constitution of the United States. If the steamship or vessel plying between California ports was, while on the ocean engaged in commerce with foreign Nations as was observed in the Lehigh Valley decision in

discussing *Lord* v. *Goodall N. & P. Steamship Company*, 102 *U. S.*, 541, *then a railroad company in carrying between points in the same State by a route which passes through another State is as clearly engaged in commerce among the States while operating in the second State.* The effect in either case is to deny the jurisdiction of the State wherein a shipment commences and terminates to regulate transportation *over the entire distance when the route passes beyond its borders."*

7 Inter-state Commerce Reports, pages 160, 161, *Milk Producers Protective Association* v. *Delaware & Lackawanna Rld. Co.*

In the case of *State ex. rel. Railroad & Warehouse Commission* v. *Chicago, St. P., M. & O. Ry. Co.*, above cited, the Court in dealing with a similar question used the following language:

"By section 8, Art. 1, Constitution U. S. Congress is empowered 'to regulate commerce with foreign nations, and among the several States.' The *transportation* of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word 'commerce,' as here used. *Gibbons* v. *Ogden*, 9 wheat. 1; Case of *State Freight tax*, 15 Wall. 232; *Lord* v. *Steamship Co.*, 102 U. S., 541; *Railway Co.* v. *Illinois*, 118 U. S., 557, 7 Sup. Ct. Rep. 4; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep., 1118; *Fargo* v. *Michigan*, 121 U. S., 230, 7 Sup. Ct. Rep., 857; *Carton* v. *Railroad Co.*, 59 Iowa, 481, 13 N. W. Rep. 67. Since the decision in *Railroad Co.* v. *Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4, it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation, as by prescribing rates of such transportation as is to be deemed inter-state as distinguished from wholly domestic carriage is exclusively given to Congress. The only question upon which there can be any doubt is whether the transportation to which this order of the

commission relates is to be deemed commerce or transportation between different States, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation, to be governed wholly by our state laws, and over which Congress has no control. *The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato—a large part of which—indeed, the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route, including the transit of* 148 *miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the railroad and warehouse commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receives this property within the State, and is to carry it through the foreign State to a destination within our own borders.*

In view of the above decisions of the Supreme Court of the United States, that the *transportation* of freight by a common carrier, apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of 'commerce,' to which the constitution applies, *it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State.* Assuming that the constitution places within the exclusive control of Congress the subject of transportation among the several States, let us suppose that a shipment is made from Duluth to Winona—both cities being without our State, but upon the borders of Wisconsin—by a route wholly within the latter State, excepting the inconsiderable dis-

tance of the depot grounds in those cities from the State line. Can is be said that this carriage of perhaps 200 miles through the State of Wisconsin, and of a mile or two within our own borders, is domestic transportation and commerce, as distinguished from that which, under the constitution, is to be deemed as being 'among the several States?' The constitution as interpreted by the Court whose decisions upon this subject are final, has placed under the exclusive regulation of Congress the subject of transportation among the States, so far among other things, as relates to the matter of charges, in order that it may be protected from conflicting and adversely discriminating State legislation. See authorities above cited. Is not a case such as we have supposed, of the case now before us, transportation among the States, within this purpose of the constitution, as really as would be a shipment and transportation of goods from New York, Chicago or Milwaukee to Minnesota, as to which unquestionably, under the decisions above cited, Congress, and not the several States, would have the power to regulate? We are unable to state any principle which supports the relator's claim of jurisdiction to determine what charges may be ma le for the transportation of freight through the State of Wisconsin. Whether the result would have been different if the order had prescribed rates only with respect to so much of the route as is within our own State we do not decide. *The mere fact that Duluth and Mankato are both in this State, and that a part of the line of road of this respondent is also here, and operated under our law, cannot authorize our State authorities to regulate the operations of the 148 miles of road which is wholly within the State of Wisconsin, and which there exists, and is managed, of course, under the laws of that State, subject to such limitations as the National Constitution may impose.* The order in question applies to all freight transported over this route from Duluth to Mankato. But it appears that in the usual course of business the respondent re-

ceives freight at the docks in Duluth destined for the several ports on its road, both in Wisconsin and in this State which had been received there from vessels navigating the great lakes, and which, as is to be inferred, must be classed as inter-state commerce in any meaning of that term. Of course, as to such transportation our Commission has no authority to prescribe rates under the decisions above cited. There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this State, but whose route incidentally at some point, and for an inconsiderable distance should cross the line of the State. Whether or not the transportation in such a case might be deemed to be substantially domestic, and not embracing an important element of foreign transit, we do not decide. This is not such a case. This line within Wisconsin, to which this order is applicable, was operated not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the State of Wisconsin.

The question under consideration has not come before the Supreme Court of the United States in the form here presented; but it seems to us that that Court has so determined the construction and effect of the commerce clause in the Constitution that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the constitution, and that the authority of Congress is exclusive as respects the regulation of rates for inter-state commerce.

In *Lord* v. *Steamship Co.*, 102 U. S., 541, the question presented for decision was whether Congress had the power to regulate the liability (to owners of goods lost in the course of transportation) of the owners of vessels engaged only in transportation between different ports in the same state, (Calfornia) the voyage between

such ports being in part upon the high seas, and out of the limits of the State. The Court recognized the fact that Congress had no power to thus interfere with the exclusively internal commerce of a State, and that the law of Congress (restricting the common-law liability of carriers) could be sustained in its application to this case, only in case the transportation in question should be deemed to be within the clause of the constitution empowering Congress 'to regulate commerce with foreign nations and among the several States.' It was decided that such transportation was included in 'commerce with foreign nations,' a matter of 'external concern' as respected the State of California, and subject to the regulating power of Congress. If such transportation from San Francisco to San Diego, in the same State, was 'foreign' commerce (transportation) within the meaning of the constitution, because the voyage was for the most part upon the high seas, the common highway of nations, is not the transportation from Duluth to Mankato, *by a route which for the most part is wholly within the territory of Wisconsin*, commerce (transportation) among the several States?' *Has not the State of Wisconsin at least as much interest and as large a jurisdiction concerning the transit of goods by carrier across its territory as have the nations of the world, including our own, in the voyage merely from port to port in the State of California?* How can the one be deemed foreign and the other exclusively internal, as respects the State of Minnesota? We are unable to make any distinction, and it seems to us that our decisions must be controlled by that above cited. *Steamship Co.* v. *Board*, 9 Sawy., 253, 18 Fed. Rep., 10, was like that last cited, except that the question related to the power of the State authorities of California to regulate rates of transportation upon steam vessels between various ports in that State. That authority was denied for the reason that it was not domestic commerce, the vessel in the course of the voyage going out to sea more than a league from land. Field, J., wrote the opinion of the Circuit Court.

A case closely analogous to that under consideration was very recently decided by the Supreme Court of South Carolina, in *Sternberger* v. *Railroad Co.*, 7 S. E. Rep., 836. The defendant was charged with violating statute of that state which forbids a higher charge for a shorter than for a longer carriage. The property had been shipped from Charleston to Tatum—both places being within that State. The course of transit from Charleston was, first, over two railroads wholly within the state; then to a point in North Carolina over a road operated in both states; then for some distance within North Carolina, over a road wholly within that State, then it was received in North Carolina by the defendant road, which was operated in both states, and transported to its destination at Tatum. The charge exacted for the entire distance was $4.40, while the freight to a point six miles further would have been only $4. It was held that the railroad commission of South Carolina had no jurisdiction to fix rates for such transportation; nor does the decision seem to rest entirely upon the fact that one of the roads in this route was wholly in North Carolina. That fact, as we think, should not have affected the result.

The Inter-state Commerce Commission has recently (November, 1888) ruled upon the question here presented, holding that commerce between points in the same State, but which in being carried from one place to the other, passes through another State, is inter-state commerce, subject to Congressional regulation, *Cotton Exchange* v. *Railway Co.*, 2 Interst. Com. R., 375. We are aware that the Supreme Court of Pennsylvania has held to the contrary. *Com.* v. *Railroad Co.*, 17 Atl. Rep., 179. If those cases were wholly analogous to that before us, that Court has not regarded the decision of the Court of last resort in such cases, in *Lord* v. *Steamship Co.*, *supra*, as having the effect which we think must be accorded to it.

Our conclusion is that the commission had no juris-

diction to prescribe rates for transportation through the State of Wisconsin."

Supra 41 N. W. Rep., (1047), 1049.

In the case of *Sternberger* v. *Cape Fear &c. Rld. Co.*, above cited, the Court decided that transportation between two points in the same State over connecting railroad lines, one of which lies wholly in another State, is interstate commerce and beyond the jurisdiction of the South Carolina Railroad Commission. Among other things the Court said:

"Now while it is admitted that our State railroad commission has jurisdiction over all railroads commencing and terminating in the State, and over all transportation between points within the State, yet it is equally true, that it has no jurisdiction over transportation running from the State into another State, or *from another State into this State or running entirely in another State.*"

Supra 7 S. E. Rep. 37, *Sternberger* v. *Cape Fear &c., Rld. Co*

In the case of *Wabash &c. Ry. Co* v. *Illinois*, above cited, in which the Court was discussing the effect of the statute of Illinois in regard to the regulation of rates and that portion of transportation performed within the State of Illinois, the Court used the following language:

"If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State disconnected from continuous transportation through or into other States there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for certain prices from Cario to Chicago or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate, *the reason for this is that both the charge* and the actual

transportation in such cases are exclusively confined to the limits of the territory of the State and is not *commerce among the States or interstate commerce, but is exclusively commerce within the State.*"

118 U. S., pages 564-565, *Wabash &c. Rld. Co.* v. *Ill.*

In the same case the Court used the following language, see page 572:

"If each of the States through whose territories these goods are transported can fix its own rules for prices for modes of transit, for times and modes of delivery, and all the other instances of transportation to which the word regulation can be applied, it is readily seen that the embarrassments upon inter-state transportation as an element of inter-state commerce might be too oppressive to be submitted to."

108 U. S., *Wabash, &c., R. R. Co.* v. *Illinois,* page 572.

XIII.

Interstate Commerce and Federal Control.

The authorities seem to be clear that when transportation crosses a State line, the commerce becomes intermingled with and is among the different States or jurisdictions upon whose territory the carriage is performed.

Gibbons v. *Ogden,* 9 Wheat., 1.

In this case Chief Justice Marshall uses the following language:

"The words are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.'

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of

enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying or selling, or to the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the union has no direct power over that subject and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised by the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce including navigation was one of the primary objects, for which the people of America adopted their government and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that 'commerce,' as the word is used in the constitution, comprehends navigation also, requires

any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions and prescribed these inhibitions, understood the power to which they applied as being granted.

* * * * * * * *

The word used in the constitution then, comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'

To what commerce does this power extend? The constitution informs us, to commerce ' with foreign nations, and among the several States and with the Indian tribes.'

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which the power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a *unit*, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, *and remain a unit*, unelss there be some plain intelligible cause which alters it."

Commerce is again defined in the famous passenger cases, the same being known as *Smith* v. *Turner* and *Norris* v. *City of Boston*, reported in 7 Howard, page 283.

Mr. Justice Wayne, in delivering the opinion, says on page 416:

"Commerce between nations or among States has several branches. Martens, in his summary of the Laws of Nations, says: 'It consists in selling the superfluity; in purchasing articles of necessity as well productions as manufactures; in buying from one nation and selling to another, *or in transporting the merchandise* from the seller to the buyer to gain the freight.'

'Generally speaking, the commerce in Europe is so far free that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for the purpose. A State of war forms here a natural exception. However, as long as there is no treaty existing, *every State retains its natural right to lay on such commerce whatever restriction it pleases.*'

* * *

In all of the foregoing particulars Congress may act legislatively. It is conceded that the States may not do so in any one of them."

In the State Freight Tax Case, known as *Reading Railroad Co.* v. *Pennsylvania*, 15 Wall., 232, the Court in speaking through Mr. Justice Strong, says:

"Considering it, then as manifest that the tax demanded by the Act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities *transported through the State* or from points without the State to points within it, or from points within the State to points without it, the Act is a regulation of

inter-state commerce. Beyond all question the transportation of freight or of the subjects of commerce for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of *articles of trade from one State to another was the prominent idea* in the minds of the framers of the Constitution when to Congress was committed the power to regulate commerce among the several States. *A power to prevent embarrissing restrictions by any State was the thing desired.* The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign Nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer or from the place of production to the market, *regardless of the point of origination and the point of destination*, was not contemplated, for without that there could be no consummated trade either with foreign nations *or among* the several States.

In his work on the Constitution, sec. 1057, Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only the traffic, but intercourse and navigation. And in the passenger cases, 7 How., 416, it was said: 'Commerce consists in selling the superfluity and purchasing articles of necessity, as well products as manufactures, in buying from one Nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this intercourse of goods from the seller to the buyer is intercourse. Among the States, it must have been principally by land when the Constitution was adopted."

Appellee's position is clearly sustained by this Court in the case of *Lord* v. *Steamship Co.*, 102 U. S., 441.

The following is included in the statement of the case:

"The steamship Ventura, owned by the defendant in error, was employed in navigation between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of 480 miles on the Pacific Ocean. She formed a part of a transportation line which was largely engaged in foreign and inter-state commerce, but was herself only employed on her own route, and neither took on nor put off goods outside of the State of California. While on one of her regular voyages from San Francisco to San Diego she was totally lost, with all her pending freight and cargo, on the coast of California, without the privity or knowledge of her owner. This suit was brought against her owner as a common carrier to recover the value of the goods lost."

In rendering the decision, Mr. Chief Justice Waite says:

"The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, *but engaged only in the transportation of goods and passengers between ports and places in the same State.* It is conceded that, while the Ventura carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power 'to regulate commerce with foreign nations and among the several States, and with Indian tribes,' but it has nothing to do with the purely internal commerce of the States; that is to say, with such commerce as is carried on between different parts of the same State, *if its operations are confined exclusively to the jurisdiction and Territory of that State, and do not affect other nations or States or the Indian tribes.* This has never been disputed since the case of *Gibbons* v. *Ogden*, 9 Wheaton, 1. The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by way of the Pacific Ocean. They

could not be performed except by going, not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This was also settled in *Gibbons* v. *Ogden*, *supra*. Commerce with foreign nations, says Mr. Justice Daniel for the Court in *Veazie* v. *Moor*, 14 How. 568, 'must signify commerce which, in some sense, is necessarily connected with these nations, transactions, which either immediately or at some stage of their progress must be extra-territorial.'"

In *Pacific Coast Steamship Co.* v. *Board of Railroad Commissioners* (Calf.), 18 Fed. Rep., 10, the syllabus is as follows:

"The State Board of Railroad Commissioners has no power to regulate or interfere with the transportation of persons or merchandise, by a steamship company, between ports within the state, if they be in transit to or from other states, or when in navigating the ocean the vessel goes beyond a marine league from the shore. This power has been conferred upon Congress, and is exclusive."

The Court, speaking through Mr. Justice Field, says:

"Nor are the vessels engaged in purely domestic commerce when their voyages between ports of the same State require them to navigate the ocean. When they go beyond the marine league they pass out of the jurisdiction of this State, and come under the exclusive control of Congress. *To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State. Lord* v. *Steamship Co.*, 102 U. S. 541.

If the steamships of the plaintiff carried any persons or merchandise between ports of the State *not going out, on their voyage between these ports, of the jurisdiction of the State,* and the persons or merchandise carried

not coming from any other state or foreign country, or going to another state or country, the transportation commencing and ending in the State, then to that extent the railroad commissioners might have jurisdiction to regulate the fares and freight for transportation on the vessels between ports of the State,—that is, between San Francisco and such ports along the coast,—they pass out upon the ocean beyond a marine league from the shore. They are, therefore, engaged in no transportation which the commissioners can regulate."

18 Fed. Rep., page 10, *Supra.*

In the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, the following language was used, bearing on the meaning of the word "commerce."

"Commerce among the States consists of intercourse and traffic and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive."

In the commerce clause of the Constitution, the word "among" appears, the meaning of which is clearly defined by Chief Justice Marshall in the case of *Gibbons* v. *Ogden, supra,* as follows:

"The subject to which the power is next applied, is to 'commerce among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, *but may be introduced into the interior.*

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or effect other states. Such a power would be inconvenient, and is certainly unnecessary."

In *Sternberger* v. *Cape Fear Ry. Co.,* 7 S. E. Rep., 837, the Court says:

"Or it may be conducted and engaged in between individuals living in different States, *or transported over railroads lying in and running through different States.* It is then inter-state commerce, and its regulation belongs to Congress. Now, here was a purchase by the plaintiff, a citizen of South Carolina, of a ton of commercial fertilizer, from a citizen in Charleston, both of the same State. Thus far, this transaction belonged to internal or domestic commerce, and would be subject to State control, if any. But the plaintiff lived at Tatum, in Marlboro county, some distance from Charleston, and to reach him his fertilizer had to be transported by railroads to him; and, as it turns out, by railroads, some entirely in South Carolina, some in North Carolina, and others partly in both. Now, while it is admitted that our State railroad commission has jurisdiction over all railrads commencing and

terminating in the State, and over all transportation between the points within the State, yet it is equally true that it has no jurisdiction over transportation *running from the State into another State*, or from another State into this State, or running entirely in another State. Transportation like that suggested in the two first classes mentioned would be interstate commerce, while that in the last class would be the domestic commerce of the State in which it might be conducted. Applying these principles to the case in hand, it seems that only two of the railroads over which this ton of fertilizer was transported commence and terminate within the limits of the State—The Northwestern and the Cheraw & Darlington; and if the question here had originated out of the freight of these two roads only, one or both then there could have been no doubt as to the jurisdiction of the commission. But the Cheraw & Salisbury road is partly in this State and partly in North Carolina, and the Carolina Central road, from Wadesboro to Shoe Heel, is entirely in North Carolina, and then the Cape Fear and Yadkin Valley is partly in the two States. Our commission has no right to adjudicate questions of freight on roads like these three, for the simple reason that they are not South Carolina roads."

The *Milk Producers Protective Ass'n.* v. *Delaware, L. & W. R. Co.*, Vol. 7, Inter-state Commerce Reports, 158, contains an exhaustive opinion by the Inter-state Commerce Commission, bearing upon the matter under consideration by this Commission, as follows:

"The roads of the Elmira, Cortland & Northern Railroad Co. and the Delaware & Hudson Canal Co., wholly in New York, are employed in connection with the Lackawanna, under a 'common arrangement' for continuous carriage or shipment, in the transportation of milk and cream from points in New York to Hoboken, N. J., and the provisions of the Act to regulate commerce

apply to such transportation and the carriers engaged therein. The transportation of milk and cream by any of the defendants to Hoboken, Jersey City or Weehawken, which is performed wholly within the State of New Jersey, is not subject to regulation under that Act.

A further question of jurisdiction is raised by the Susquehanna as to 65 per cent of the milk transported by it from points in the State of New York. It claims that such portion of its milk from New York points, though carried through New Jersey, is delivered by it in New York City, and that transportation so conducted between points in the same State is not subject to the Federal statute. The decision of the United States Supreme Court in *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S., 194, 36 L. Ed., 673, 4 Inters. Com. Rep., 87, is relied upon by counsel for the Susquehanna as authority for a ruling that traffic shipped between points in the same State, but passing through another State in the course of transportation, is not within the provisions of the statute; and in their brief counsel call attention by citation to the fact that this commission regarded the Lehigh Valley case as such authority in *Chamber of Commerce of Minneapolis* v. *Chicago, M. & St. P. R. R. Co.,* 5 I. C. C. Rep., 571. We did not have occasion to decide the question in the Minneapolis case, and our reference there to the Supreme Court decision was that it *seemed* to have the effect of excluding commerce between points in the same State which passes through another State from regulation by the Federal government. The question is now distinctly raised as to the greater part of the milk traffic shipped over the Susquehanna from New York points, and we have carefully examined and considered the Lehigh Valley decision with a view of determining whether it is actually controlling as claimed by counsel. That case involved the right of the State of Pennsylvania to tax the receipts of the Lehigh Valley Company from traffic shipped between points in that State, but passing through New Jersey in course of

transportation, *so far as such receipts arose from service over the Lehigh Valley mileage within the State of Pennsylvania.* There was no dispute as to the amount of the tax, and the only question raised was whether the State could lay a tax upon the business at all. The Supreme Court upheld the validity of the tax involved. Whatever other or broader applications may be given to language used or principles considered by the Court in that case, *the decision was confined to the question of taxation on what was done or earned within the State.* The Lehigh Valley carried the property from a point in Pennsylvania to the New Jersey line and just across it to Phillipsburg, N. J., and from thence the continuous carriage was by arrangement conducted by the Pennsylvania Railroad Company to Philadelphia, Pa. If the State of Pennsylvania had attempted to regulate the aggregate charge or charges made for the entire transportation through different States, we think the Court would have had an entirely different case to consider. In this milk case, the Susquehanna, in carrying from Middleton, N. Y., to Jersey City, N. J., is admittedly engaged in inter-state transportation, and the carriage from Jersey City, N. J., to New York City, N. Y., across the Hudson River, whether performed by ferry or lighter, is also transportation between different states. Yet its contention is that by combining these two interstate transportations the service becomes intrastate, and the commerce internal to the State of New York. A state and an inter-state transportation may be combined and made continuous so as to *extend* the interstate service over the whole distance; but we are unable to understand how two distinctly inter-state carriages can, on being connected and made continuous, be *contracted* into purely State transportation because the beginning and ending points happen to be in the same State, so as to give that State jurisdiction of the whole transportation. The Lackawanna receives freight at New York City, takes it across the river to New Jersey,

and through that State and the State of Pennsylvania to Binghampton, N. Y., and out of the total distance of about 208 miles less than 15 are within the State of New York. Granting that New York may impose a tax on the gross receipts of the Lackawanna, represented by its mileage in New York, on traffic between points in that State, does it follow that New York can also regulate the freight charges and passenger fares of the Lackawanna for the whole distance between New York City and Binghampton, N. Y.? We think not. If neither of the States through which the transportation is conducted has power to regulate the entire transportation or the compensation exacted therefor, it does follow, we think, that such power is vested in the general government. This commission held, in 1888, in *New Orleans Cotton Exchange* v. *Cincinnati, N. O. & T. P. R. Co.*, 2 I. C. C. Rep., 375; 2 Inters. Com. Rep., 289, that:

'All commerce is subject to regulation; that wholly within a State and subject to its sovereign power by the State; that among the States and with foreign nations and not wholly within the sovereign power of any one State by the United States, for the reason that to be effectual, regulation must be uniform, at least not conflicting. Commerce between Shreveport and New Orleans, while crossing on the ferry between Delta, La., and Vicksburg, Miss., is not subject to regulation by the State of Louisiana. The business of transferring freight by the ferry between the two States is inter-state commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; 29 L., ed. 158; 1 Inters. Com. Rep., 382.

'While passing through Mississippi, after passing from Louisiana, this commerce is inter-state, and subject alone to inter-state regulation. It is not subject at any place between Shreveport and New Orleans to regulation by both the State and the Congress. It passes by continuous carriage from Louisiana to, and through the State of Mississippi. It is not transportation 'wholly within one State.' It is subject to regulation by the pro-

vision of the Act to Regulate Commerce, and the commission has jurisdiction to revise the rates when the parties interested in them are before it.

The Lehigh Valley decision is not necessarily in conflict with this view. The Supreme Court called attention in that decision to the fact that the case was one of taxation, *and not one of direct regulation, citing Pacific Coast S. S. Co.* v. *Board of R. Commrs*, 9 Sawy., 253, as indicating the distinction. In the case so cited, the California Commission sought to regulate commerce between ports of that State when carried by a line of vessels navigating the Pacific Ocean more than a marine league from the shore, Mr. Justice Field, sitting as circuit justice and writing the opinion, said: 'To bring the transportation within the control of the State, as part of domestic commerce, *the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.*' That decision seems to rest entirely upon the commerce clause in the Constitution of the United States. If the steamship or vessel plying between California ports was, while on the ocean, engaged in commerce with foreign nations, as was observed in the Lehigh Valley decision in discussing *Lord* v. *Goodall, N. & P. S. S. Co.*, 102 U. S., 541, 26 L. ed., 224, then a railroad company in carrying between points in the same State, by a route which passes through another State, is as clearly engaged in commerce among the States while operating in the second State. The effect in either case is to deny the jurisdiction of the State wherein the shipment commnces and terminates to regulate transportation over the entire distance when the route passes beyond its borders.

In *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S., 204, 38 L. ed., 962, 4 Inters Com. Rep., 649, decided since the Lehigh Valley case, the power of a State to tax, and its power to prescribe a scale of charges for the use of instrumentalities of inter-state commerce, are carefully distinguished. The Su-

preme Court held that the action of Kentucky in prescribing tolls to be charged over a bridge between Covington, Ky., and Cincinnati, O., was a regulation of interstate commerce. 'It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that State to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the State of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the State of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the States; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each State (if the subject be one for State regulation), and made applicable to that portion of the bridge within its own territory.' After showing how, through a conflict of State interests, different tolls might be established by each State, the Supreme Court held that 'Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions.' A practical transportation route exists from Covington, Kentucky, to Louisville, Kentucky, over the bridge to Cincinnati, through Ohio and Indiana to Jeffersonville, and across a bridge to Louisville. Kentucky cannot prescribe the tolls over either bridge, nor the transportation charges between Cincinnati, O., and Jeffersonville, Ind., nor can it authorize the construction of such a line or control its operation, and it follows that it could not regulate the aggregate charges over that route between Covington and Louisville. For the same reason, New York is without power to authorize the construction of a route like the Susquehanna from Middleton, N. Y., through New Jersey to New York City, or to control the operation of such a route, or to regulate charges made thereover between Middleton and New York City.

In *Texas & P. Ry. Co.* v. *Interstate Commerce Commission* (*The Import Rate Case*), 162 U. S., 197, 40 L. ed. 940, 5 Inters. Com. Rep., 405, the Supreme Court was called upon to determine what commerce was subject to the provisions of the Act to Regulate Commerce. The Court said: 'It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (*excepting commerce wholly within the State*), as well as that between the States and Territories, as that going to or coming from foreign countries.'

We hold in this case that the Susquehanna Company is as much subject to regulation under the Act to Regulate Commerce, in respect of the portion of its milk business from New York points which it carries through New Jersey and claims to deliver in New York City as it is in regard to other interstate transportation in which it is engaged."

7 Inters. Com. Rep., Vol. 7, pp. 158 to 162.

XIV.

Further Analysis of Lehigh Valley Case.

The Lehigh Valley case does not furnish a precedent for the case at bar. The Lehigh Valley case is one where the state of Pennsylvania *levied a tax* upon certain receipts of the Lehigh Valley Railroad Co., which receipts were a portion of the property of said company. The receipts were derived from transportation by continuous carriage from points in Pennsylvania to other points in the same state, but over lines partly in Pennsylvania and partly in New Jersey. The Court used the following language:

"The receipts named in class 2 are confined to that part of the transportation from Mauch Chunk to Phillips-

burg, *and the taxation to the mileage wholly within the State of Pennsylvania;* and the question is whether this taxation in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from Mauch Chunck by way of Trenton, N. J., amounts to a regulation of interstate commerce."

The Court again said:

"The tax under consideration here was determined *in respect of receipts for the proportion of receipts within the State.*"

Several conditions entered into that case, which as heretofore shown, distinguishes it from a case where regulation of a rate is in question, or where the complaint is one of overcharge.

The Lehigh Valley Company was a Pennsylvania corporation. The Court used the following language:

"It should be remembered that the question does not arise as to the power of any other State than the State of the termini, *nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania* of the operations of this or any other company elsewhere."

Chief Justice Fuller in his opinion in the Lehigh case refers to the case of the *Pacific Coast Steamship Company* v. *Railroad Commissioners, supra*, and distinguishes the two cases as follows:

"In *Pacific Coast S. S. Co.* v. *Board of Railroad Commissioners*, 9 Sawy., 253; 18 Fed. Rep., 10, the Circuit Court for the District of California held, Mr. Justice Field delivering the opinion, that the California State Board of Railroad Commissioners had no power to

regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the State, if they were in transit to or from other states, or if the transportation consisted of voyages upon the ocean, bringing the steamships under the exclusive control of congress.

But that case involved the direct regulation by a state of transportation which had passed beyond the jurisdiction of the State, and did not decide the question of the power of a state to tax its own corporations in respect of transactions within it in the course of continuous carriage from one point to another in the State, in accomplishing which a part of another State was incidentally traversed."

In the commerce clause of the Federal Constitution by E. T. Prentice and J. G. Eagan, at pages 85, 87, 88 and 89, the following language is used:

"The Federal power over commerce extends not only to the goods which are transported, 'but also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.'

Even carriers engaged in transportation from point to point in the same state are within Federal control so far as they are engaged in interstate commerce. * * A similar rule has been applied to transportation by land from point to point in the same state, passing through another State.

The conditions under which such transportation is conducted differ widely from the conditions which surround navigation; and yet it is apparent in one case, as in the other, that the transportation is not a matter which concerns alone the domestic affairs of a single State, but it is a part of that commerce extending beyond state lines which is within Federal jurisdiction.

It is probable, however, that the difference is on one side of the line only. In the case of commerce commencing in Pennsylvania and passing through New York, it is immaterial, in measuring the powers of the latter State, whether the commerce terminates in Pennsylvania or in Ohio. In measuring the powers of Pennsylvania, however, this fact is of great importance. If goods are transported from point to point in the state, all matters relating to their purchase and sale concern that state alone, and the Federal power is involved only to the extent of securing free transportation.

The cases which have arisen on this subject have involved validity of state regulation of freights, and of state taxation. In one of the cases the question concerned the validity of regulations of freight established by the railroad commission of Minnesota for transportation from Duluth to St. Paul, passing more than half the distance through the State of Wisconsin.

The expense of transportation depends largely upon rates of taxation, obligations and responsibilities imposed by law upon railway companies in different jurisdictions, and each state in its legislation must take into consideration these facts, and the physical geography of the country, the density of its population and amount of business. What is a proper charge for transportation in one State, may, therefore, not be reasonable in another.

In the case referred to it was held that Minnesota could not fix the rates in question. In *Sternberger* v. *Cape Fear & Y. V. R. R.* a similar question arose and was decided against the power claimed by the State. In that case goods had been shipped from one point to another in South Carolina and carried over five railroads, two of these roads being wholly within the State, one being wholly outside the state, and two being partly within and partly without. It is clear that the state had no jurisdiction over the road which was entirely without

her territory. The consequence was that, whatever might be its power over roads partly or wholly within its boundaries, it could not enforce orders which concerned a road in another State; and, so far as concerned the two roads which were partly within and partly without its limits, its jurisdiction was necessarily limited by the equal power of a sister State.

It is apparent, too, that the power of the State in such cases does not depend upon the number of carriers concerned. If the whole transportation were conducted by one corporation, which might or might not be in competition with two or more carriers making a joint rate, its duties and the powers of the State would be the same. It seems, therefore, that a State cannot regulate charges for such transportation."

Referring to the Lehigh Valley case, the author says:

"That case involved state taxation of the gross earnings of the railway company within the State. The receipts upon which the dispute arose were derived from transportation to Mauch Chunck, in Pennsylvania, through New Jersey to Philadelphia, and the tax being proportioned to the mileage within the State, would be sustained, even if levied upon receipts derived from transportation from one state to another. It is not certain, however, that regulation of interstate rates will always be sustained in cases where taxation of such rates will be. *The transportation is a unit, and the rate charged is a unit*—a single fare for a single service. A part of the rate which fairly represents travel within the State, may perhaps be taxed without reference to the part which is earned outside the State; but partial regulation is impossible. Furthermore, it should be noticed that, apart from the possible difference between taxation and regulation of rates, there is, since the passage of the Inter-

state Commerce Act, an express limitation upon the powers of the State to regulate rates which does not exist in the taxation of rates. *It seems, therefore, that the Lehigh Valley case does not support state regulation of interstate rates, and that, as concerns this subject, the rule which will probably be followed is that announced in the earlier case.*"

Speaking of the Lehigh Valley case, the Interstate Commerce Commission, as heretofore shown, in the case of the *Milk Producers Protective Assn.* v. *Delaware L. & W. R. Co.*, page 158 of Vol. 7, Interstate Commerce Rep., say:

"That case involved the right of the State of Pennsylvania to tax the *receipts* of the Lehigh Valley Company from traffic between points in that state, but passing through New Jersey in course of transportation, *so far as such receipts arose from service over the Lehigh Valley mileage within the State of Pennsylvania.* There was no dispute as to the amount of the tax, and the only question raised was whether the State could lay a tax upon the business at all. The Supreme Court upheld the validity of the tax involved. Whether other or broader application may be given to language used or principles considered by the court in that case, *the decision was confined to the question of taxation on what was done or earned within the State.* The Lehigh Valley carried the property from a point in Pennsylvania to the New Jersey line and just across it to Phillipsburg, N. J., and from thence the continuous carriage was by arrangement conducted by the Pennsylvania Railroad Company to Philadelphia, Pa. *If the State of Pennsylvania had attempted to regulate the aggregate charge or charges made by the entire transportation through different states, we think the court would have had an entirely different case to consider.*"

XV.

Difference Between Taxing Commerce and Taxing the Instrumentalities of Commerce.

While it is permissible for the states to tax property of a railroad, situated entirely within the State, even though the road be engaged in interstate commerce, still it does not permit the State to tax interstate commerce or in any way to regulate the rates for interstate commerce. This is clearly established by the following cases:

The *Henderson Bridge case* v. *City of Henderson*, U. S. Supreme Court Rep., Vol. 173, page 191, was a case in which the city of Henderson attempted to levy a tax upon the bridge, abutments and property of the Henderson Bridge Company. The Bridge Company contested the tax for several reasons, among others being that it was a regulation of the means of interstate commerce and therefore a regulation for interstate commerce itself; that the right to regulate commerce is vested solely in Congress, and that the levy of said tax was unconstitutional and void. The opinion written by Mr. Justice Harlan deals with the question in the following language:

"Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for the purpose of interstate commerce exempt it from taxation by the state within whose limits it is permanently located. The State cannot by its laws impose direct burdens upon the conduct of inter-

state commerce carried on over the bridge. But, as the decisions of this court show, it may subject to taxation property permanently located within its territorial limits and employed in such commerce by individuals and by private corporations. In *Covington, &c. Bridge Co.* v. *Kentucky*, 154 U. S., 204, 212 (38: 962, 967, 4 Inters. Com. Rep., 649) it was said: 'As a mater of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the State may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself.' See also *Henderson Bridge Co.* v. *Henderson City*, 141 U. S., 679,689 (35: 900, 904); *Pittsburg C. C. & St. L. Railway Co.* v. *Board of Public Works*, 172 U. S., 32 (ante 354). In *Thomson* v. *Union Pacific Railroad Co.*, 9 Wall., 579 (19: 792), the question was as to the liabilities and rights of a railroad company in respect to taxation under state legislation. It was contended in that case that the road having been constructed under the direction and authority of congress for the purposes and uses of the United States, and being a part of a system of roads thus constructed, was exempt from taxation under state authority; that the road was an instrument of the general government and as such not subject to taxation by the State. That contention was overruled, this court saying: 'We are not aware of any case in which the real estate or other property of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, from just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.' *There is a clear distinction between the means employed by the government and the property of agents employed*

by the government. 'Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means.' In the same case the court said that 'no one questions that the power to tax all property, business and persons within their respective limits is original in the states, and has never been surrendered,' although that power cannot be so used 'as to defeat or hinder the operations of the national government.' The same principles have been maintained in other cases in this court. If a state may tax the property of one of its corporations engaged in the service of the United States, such property being within its limits, there is no sound reason why the bridge property in question, although erected with the consent of congress over one of the navigable waters of the United States, should be withdrawn from the taxing power of the State which created the corporation owning it and within whose limits it is permanently located."

It is to be noticed that the Court refers to the Covington Bridge case, in which case it was held that the levy of toll was a regulation of interstate commerce. This illustrates the distinction between the Lehigh Valley case and the case at bar. The Lehigh Valley case, as well as the Henderson Bridge case, was one where the property itself was taxed and not the road; therefore it was not a regulation of commerce. In the Covington Bridge case a toll was levied both upon the Kentucky side and the Ohio side; these tolls, of course, were conflicting and there was a discrimination. The tolls themselves were rates. In the Henderson Bridge case this Court held that the levy of the tax upon a property is constitutional, and that a State may

tax the instruments of interstate commerce, *but cannot tax or regulate the commerce itself.* In the Lehigh Valley case, as likewise in the Henderson Bridge case, there was no regulation of the rates themselves, *but merely a tax upon the property of the company, which property in one case was the revenues or monies in the treasury of the company.* In the Henderson Bridge case the tax was upon the property itself, but in the Covington Bridge case, as in the case at bar, it was a toll of rate, and therefore a regulation of commerce itself.

To the same effect as the two cases cited hereunder see 76 U. S., 579, *Thompson* v. *U. P. R. R. Co.*

As illustrating further the difference between taxing commerce itself and taxing the instrumentalities of commerce, or the fruits of commerce, we refer to the case of *Philadelphia & Reading Railroad Company against Commonwealth of Pennsylvania*, commonly known as the case of the State Freight Tax, reported in volume 15 Wall., 232, in which the Court used the following language:

"Upon what, then, is the tax imposed by the Act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it, in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the commonwealth 'on each two thousand pounds of freight so car-

ried,' a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the Act provides, 'where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof,' no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines, thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the Act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: 'Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.' Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier, to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their

charters in the rates of toll they are allowed to charge. Hence, the right to increase the tolls to the extent of the tax was given to them, in order that the tax might come from the freight transported and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefor, add the tax to the charge for transportation without further authority. *Boyle* v. *Reading R. R. Co.*, 54 Pa. St., 310; Cumb. Val. R. R. Co.'s Appeal, 62 Pa. St., 218. In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is, in effect, only a tax-gatherer. The practical operation of the law has been well illustrated by another when commenting upon a statute of the state of Delaware, very similar to the one now under consideration. He said: 'The position of the carrier under this law is substantially that of the one to whom public taxes are farmed out—one who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is that in the case of taxes farmed out the obligation to account to the government is voluntarily assumed by contract and not imposed by law, as upon the carrier under this Act; also, that different means are provided for raising the tax out of those ultimately chargeable with it.' *Clarke* v. *Phil., Wil. & Balt. R. R. Co.*

Considering it, then, as manifest that the tax demanded by the Act is imposed, not upon the company, but

upon the freight carried, and because carried, we proceed to inquire whether, so far as it effects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the Act is a regulation of interstate commerce. Beyond all question, the transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constitutent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution, Sec. 1057, Judge Story asserts that the sense in which the word 'commerce' is used in that instrument includes not only traffic but intercourse and navigation. And in the passenger cases, 7 How., 416, it was said: 'Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. *Among the states it must have been principally by land when the constitution was adopted.*

Then, why is it not a tax upon freight transported from State to State a regulation of interstate transportation and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? * * *

That this argument rests upon a misconception of the statute is, to our minds, very evident. We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of highways or means of conveyance. The State is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals the State has no title to their income, except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the State. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this Act is, therefore, not a toll. It is not exacted in compensation for the use of the roadway, and if it were, the right to make terms for the use of the roadway is in the grantee of the franchise, not in the grantor. But, in truth, the State has no more right to demand a portion of the tolls which the grantees of her franchises may exact, than she

would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyoud her reach."

XVI.

A State Railroad Commission Cannot fix a Rate of Carriage Between Points Within the same State where the Route Extends Across the Boundary of a Neighboring State.

Such power is exclusively in Congress. This appears from the authorities already cited. But we would, however, refer with special emphasis to the case of *State ex rel. Rld. & W. C. against Chicago, St. P., M. & N. Ry. Co.*, reported in 41 N. W., beginning on page 1047, and from which we have heretofore quoted.

Also to the case of the *New Orleans Cotton Exchange* v. *C. N. O. & T. P. R. Co.*, reported in volume 2 Interstate Commerce Reports, at page 289.

See also other cases cited herein.

XVII.

Necessity of Federal Control over Interstate Commerce.

Mr. Justice Field, in the case of *Gloucester Fruit Co.* v. *Commonwealth of Pa.*, 114 U. S., 159, states very clearly the reason why it was deemed best, by the framers of the Constitution, to invest Congress with the exclusive power over

commerce between the states, and with foreign nations. The reason he gave for this granted power is expressed by him as follows:

"And it needs no argument to show that the commerce with foreign nations and between the states, which consists in transportation of persons and property between them is a subject of national character and requires *uniformity of regulation.* Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against *conflicting regulations of different states,* each legislating in favor of its own citizens and products and against those of other states. It was from apprehension of such conflicting discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce, with foreign nations and among the states, was vested in congress."

Therefore, in determining the questions arising under the bill in this case, the first proposition to be considered is whether the facts set out in the bill indicate that in the shipment of freight from Fort Smith, Arkansas, into and through the Indian Territory, to another point in Arkansas, there would arise a conflict between the State of Arkansas and the Indian Territory, or to State it otherwise, would the Indian Territory, as a separate State, be affected in its rights by the shipment of this freight, or could it in turn, by the exercise of its power, affect the railroad over which the shipment was made by any regulations that it, as a separate state, might see fit to pass. If a conflict of this kind could arise with reference to such ship-

ments then the commerce must be of that kind which is exclusively under the jurisdiction of the Congress of the United States.

It must be conceded that the railroads have a right to charge such rate for the shipment of freight as will secure to them a reasonable profit over and above the expense of operating the road, and the payment of taxes and the interest on its indebtedness. It must also be conceded that the Indian Territory, or Congress for it, has the right to regulate the running of all trains through that Territory, from the moment they reach its borders on the one side until they leave it on the other. The bill shows that that part of the Territory through which the road passes is a populous country, that there are many stations along the line, and that the road has junctions and connections with other roads. The Congress of the United States has the power to regulate within the Indian Territory the speed of trains, to provide how they shall be run, for instance, as to whether or not the trains shall be run with double-headers, what equipments they shall have, to provide what rate of taxation the road shall pay, to provide upon what terms it shall interchange freight with other connecting carriers, to provide whether the separate coach law shall be in effect within that Territory, and in many other ways, by its power to regulate and to tax, it has the power to affect greatly the cost of transportation through that Territory. The framers of the Constitution realized fully the necessity of

providing some tribunal that would not be actuated by selfish motives in regulating commerce of this kind. They realized fully that the tendency of each State would be to pass such legislation as would be most beneficial to its citizens, or at least that would meet the selfish views of the citizens of that State. They foresaw that this would necessarily place the interest of the citizens of one state in conflict with the interest of the citizens of another, and that their legislatures would be unable to harmonize these interests. Therefore, they wisely provided that Congress should be vested with this superior power. For the sake of emphasizing, we repeat here again the language of Justice Field, in the case of *Gloucester Fruit Co.* v. *Commonwealth of Pa., supra:*

"Otherwise there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States."

The powers existing between Arkansas and the Indian Territory with reference to the shipment of freight in this case brings the case completely within the letter and the principle laid down by Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat., 69. In that case the court used the following language:

"The subject to which the power is next applied is to commence among the several States. The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary

line of each State but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and *which does not extend to or affect other States.*"

Treating the Indian Territory as a State with the power of legislation, for it has that power through Congress, we submit the following propositions: The appellee's predecessor had no power to build its road through the Indian Territory, except by the consent of that Territory, nor has appellee any power to operate the road through there except by the consent of the Territory. It can operate it only in such manner as the Territory shall dictate. There can be no doubt whatever but that the Territory is affected, and seriously affected, by the operation of every train that passes through it. *The test laid down by Chief Justice Marshall is, as to whether more than one state would be affected by the transportation; if so, it is interstate commerce. If only one state is affected it would be intra-state commerce.*

To show that the states have power and control only over such shipments as are wholly and completely within its territory, we again appeal to the case of *Gibbons* v. *Ogden, supra.* The language there used is:

"That commerce which is completely internal; which is carried on between man and man in a state or between different parts of the same state, and which *does not extend to or affect other states.*"

Again, Chief Justice Marshall, in the same case says:

"The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those external concerns which affect the states generally, but not to those which are completely within a state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

Congress evidently understood that the only power left to a state was to control such commerce as was wholly and completely within its borders, for in section one of the act known as the Interstate Commerce Act, approved Feb. 4th, 1887, in a proviso it stated:

"That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, *wholly within one state*."

There can be no question but that it is intended to exclude any semblance of authority or power the state might seek to exercise over freight after it had passed beyond its borders.

We see no reason why the navigation cases referred to by us in support of our contention in this case, are not fully applicable to it.

It was contended in the trial court by counsel for appellants that those cases involved the question of navigating the high seas. That is true, but when we come to the reason for vesting in Congress the power over commerce with for-

eign nations, *it is the same reason that caused the power to be vested in Congress to regulate intercourse between the several states.* The interests of the different states being so conflicting would absolutely preclude them from agreeing upon any mode or method of regulating the controversies arising out of the traversing of ships of this country over the high seas, consequently the power to do so was granted to congress. The conflicting interests of the states would utterly forbid their being able to agree upon the regulation of commerce between the different states. Therefore, that power was vested in Congress. The reason is the same, and it is no stronger in the one case than in the other. If there is any difference it is only in degree. Therefore, the navigation cases are absolutely in point in this case. In the navigation cases the moment the vessel crosses the line of a marine league from shore they enter into a jurisdiction over which the State had no control or power. Their passage over the high seas must be regulated by some other power and with reference to the rights of other nations; therefore, Congress was clothed with the power to represent the several states in that matter. The very moment freight leaves the borders of the state in which the transportation originated and enters another State, the State which it has left loses all control of it. During its passage through another state the train that carries it is subject to another jurisdiction. The conflicting interest arises

the moment the dividing or state line is crossed. *Neither state can control it in its entire passage; therefore, a higher power must be called upon. That power is Congress.* There is an exact similarity between the power of Congress over navigation of the high seas and that of its power over transportation by land, that affects more States than one, and the reason grows out of conflicting jurisdiction.

Upon argument of this case in the trial court the question was asked as to whether or not Congress would have the right to regulate freight that started from the State of Illinois, for instance, and ran through Canada and from Canada into the State of New York. Our answer is that Congress would have no power over the transportation of that freight through Canada except such as was acquired by treaty with Canada, but it would have control over the freight that passed from one State to another, so far as the States were concerned, whether it went through Canada or not. It is clear that if freight left a station at some point in Montana, ran part of the way through Canada and back into Montana, the Dominion of Canada would be so affected by it that it would be held to be foreign commerce and no power in this country other than the Congress of the United States, through its treaty making power, could control it, as far as this country is concerned.

XVIII.

Power of State to Tax Receipts Derived From Interstate Commerce.

During the argument in the trial Court there was much discussion of and many questions asked concerning the power of the States to tax freight receipts derived from commerce of which a portion of the transportation was performed in a State other than that imposing the tax. It may be that these questions will be repeated.

We feel, therefore, that upon this matter we cannot do better than to submit the admirable review of the cases bearing thereon as written by Messrs. Prentice & Eagan. It will be found on pages 260 to 268 of their work above referred to, the Commerce Clause of the Federal Constitution. Their language is as follows:

TAXATION OF RECEIPTS.

"A State may tax receipts derived from business carried on entirely within its limits, but it may not tax receipts derived from business outside its jurisdiction, where the person or corporation conducting the business is not domiciled in the taxing State and the receipts have not been introduced within its limits so as to become part of its property.

There has been, however, great diversity of views as to the power of the State to tax receipts derived from transportation across State lines.

In the first case on the subject, *State Tax on Gross Receipts*, the court distinguished between a tax upon goods on account of their carriage, and a tax upon the fruits of carriage when reduced to possession and min-

gled with the other property of the carrier. The tax was laid upon receipts of corporations organized under the laws of Pennsylvania, and was collectible once in six months. The court held that this tax fell upon a fund which had become incorporated with the general mass of property in the State, and that it was valid, as would have been a tax upon imported goods after the package had been broken. The States, it was said, may tax the property, real or personal; of all their corporations, including carrying companies, as they tax similar property belonging to natural persons, and to the same extent. This taxation may be laid upon a valuation or may be an excise, and in exacting an excise tax from their corporations the States are not obliged to impose a fixed sum upon franchises or their value, but may demand a graduated contribution, proportioned either to the value of the privileges granted, to the extent or to the result of their exercise. No mode of affecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the Constitution. The tax in question, it was said, was manifestly imposed upon the railroad companies measured in amount by the extent of the business or the degree to which their franchises were exercised. The statute did not look beyond the corporation to those who may have contributed to its treasury. The tax was not levied until after the money received for freights and from other sources of income was actually in possession of the company, and has lost its distinctive character as freight. Such a tax as this, it was held, fell within the power of the States.

In view of the decision in the case of the *State Freight Tax* which had just been made, 'it is not too much to say that the Gross Receipts decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that

the decision must soon be overruled. Even at the first, its force was much weakened by the strong dissent of three judges.'

In the dissenting opinion it was said that there was practically no difference between a tax upon transportation and one upon its proceeds. To hold that the tax on freight is within the evil to be remedied by the commerce clause, and that a tax on receipts therefrom is not, is 'to keep the word of promise to the ear and break it to the hope.'

It was conceded that transportation companies may be taxed in any way that does not necessarily impose a burden upon interstate transportation; but it was said that these companies differ from banking, insurance or manufacturing companies in that, while the latter concerns are only remotely or incidentally connected with commerce the business of transportation is itself commerce.

In concluding the dissenting opinion Mr. Justice Miller said:

'I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay it a tax, contribution or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The interstate commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should

not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

I think the tax on gross receipts is a violation of the Federal Constitution, and therefore void.'

A large number of decisions are to be found announcing the doctrine approved by the majority of the Court in this case and supporting State taxation of gross receipts.

In *Erie Railway* v. *Pennsylvania*, a State law was sustained which imposed a tax on gross receipts of railroad companies doing business in the State, in the proportion of their mileage within and without the State. In this case the tax was levied upon receipts of a consolidated corporation existing under the laws of Pennsylvania, Maryland and Delaware. There was no discussion of the constitutional question, but the case of *State Tax on Railway Gross Receipts* was followed. A similar decis was made in *Minot* v. *Railroad Co.*, where a tax upon net receipts was sustained when levied in proportion to the mileage within and without the State. Many other cases sustained taxation upon receipts of railroad, express, telegraph and other companies engaged in commerce among the States, and upon receipts from sales of imported goods; and this rule seems to have been approved by the Supreme Court as late as 1884, in the case of *Moran* v. *New Orleans*. In 1887 the rule which had so long prevailed was changed, and the case of the *State Tax on Railway Gross Receipts* was considered and questioned. The case announcing the new rule is that of *Steamship Co.* v. *Pennsylvania*. That case involved the validity of a tax levied by Pennsylvania upon gross receipts of a steamship company, incorporated under its laws, derived from transportation of persons and prop-

erty by sea between different States and to and from foreign countries. In holding this tax invalid, the court said that the question was whether the tax upon the receipts amounted to a regulation of, or an interference with, interstate and foreign commerce. It was levied directly upon the receipts derived by the company from its freight and fares for the transportation of persons and goods between different States and countries. 'This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this Court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State, without the interference with the power of congress.'

Accepting, therefore, the fact as established, that the State could not tax the transportation, could the freights and fares received for transportation be constitutionally taxed? Looking at the substance of things, it was difficult to see any difference between such taxes. The one was tantamount to the other, and it was nearer to metaphisics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you are getting for performing it.' Such a position can hardly be said to be based on sound reason.

It was not, the Court said, within the scope of the discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce might lead. If the power exist in the States at all, it has no limit but

their discretion, and might be so exercised as to destroy that commerce, or to load it with a burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs.

The result of this case, then, was to deprive the States of power to tax receipts derived from interstate commerce.

Following this decision it was held in Indiana that a tax levied upon the gross receipts of a car company in the proportion which the mileage of the company within the State bore to that without was unconstitutional. In Vermont it was also held that receipts from transportation could not be thus taxed.

The power of the Federal government over interstate commerce, the Court said, was exclusive and supreme. The question involved was a Federal one; and while the earlier decisions of the Supreme Court were not harmonious, the later cases had carried the Federal power to the utmost length, and have much restricted, if, indeed, they have not completely annulled, the police power of the States where interstate questions are involved, and they have, in effect, swept away all State lines.'

A similar decision was rendered by the United States Circuit Court in the case of *Indiana* v. *Pullman's Car Co.*, where it was held the fact that a sum of money was earned in Indiana gives that State no right to tax it in the treasury of the company in Illinois. The statute in question, it was said, was void as an effort to give State law extra territorial force and to regulate commerce among the States.

The rule prohibiting taxation of receipts has been applied in a large number of cases and is now 'thoroughly established.'

In *Maine* v. *Grand Trunk Ry. Co.*, we reach the third stage of constitutional doctrine upon this subject, and the rule of apportionment which had been applied to the property of telegraph and car companies is applied to the taxation of gross receipts. The statute in question in this case provided that every person operating a railroad within the State should pay to the State Treasurer an annual excise tax for the privilege of exercising its franchise in the State, the amount of the tax to be ascertained by reference to the gross receipts of the company in the proportion of its mileage within and without the State. The statute was upheld on the ground that it was levied upon the railroad company, a foreign corporation, for the privilege of exercising its franchises within the State. It was permissible, the Court said, to measure this tax by reference to the receipts of the company, and nothing in this decision, it was said, conflicted with the decision in *Steamship Co.* v. *Pennsylvania*. It seems queer that the burden of the tax in question fell upon the gross receipts by which the tax was measured. The validity of a tax cannot depend upon the name which is given to it, nor can it be assumed that the ruling of the Court in *Steamship Co.* v. *Pennsylvania* would have been different had the wording of the law there involved been that which the State of Maine subsequently adopted.

In the dissenting opinion it was said that by the decision in that case it was held that taxation may be imposed upon receipts of the company for the exercise of its franchises within the State if graduated according to the mileage. This tax might be levied as upon property. The receipts might also be taxed as upon the franchise. In many other ways the burden might be laid upon them.

'If the interstate commerce of the country is not, or will not be handicapped by this course of decision,' said Mr. Justice Bradley, 'I do not understand the ordinary principles which govern human conduct.'

The decision in the *Maine Receipts Case* must be regarded as a variation from the rule stated in the *Steamship Co.* v. *Pennsylvania*. It is no longer true that receipts cannot be taxed, and that so far as this question is concerned the States do not exist. Receipts can be taxed if the rule of apportionment be followed. Since the decision in the Maine Case, receipts have been referred to, not only as a measure of value of franchises and of real and personal property, but even in addition to all these taxes they have been made subject to a payment for benefits derived from control by a State commission."

Commerce Clause of the Federal Constitution by Prentice & Eagan, pp. 260 to 268.

XIX.

During the argument in the trial Court the inquiry was made as to whether the so-called Granger cases were not authority for the doctrine that a charge for continuous transportation over several States might be divided in several parts, each of which would fall under State control.

We submit that the cases establish no such doctrine.

A clear analysis of the Granger cases, and a correct exposition of the doctrine thereof will be found in the opinion of Judge Hammond in the case of the *Louisville & N. R. Co.* v. *The Railroad Commission of Tennessee*, 19 Fed. Rep., 698, *et seq.*

The Granger cases, however, so far as such doctrine is concerned, are disposed of by this

Court in the case of the *Wabash, St. L. & Pacific R. R. Co.* v. *Illinois*, reported in 118 U. S., page 557. In the opinion, Mr. Justice Miller, while speaking of those cases, used the following language:

"Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois Court in the present case. It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. And the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. These three cases, with others concerning the same subject, were argued at the same time by able counsel, and in relation to the different laws affecting the subject of the States of Illinois, Iowa, Wisconsin, and Minnesota; the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided,

and which was argued in all those cases was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges."

Since writing the foregoing, we have received a copy of the brief of counsel for appellants. We do not deem it necessary to do more with reference thereto than to refer to a few of their citations not hereinbefore reviewed, as follows:

The case of *Ratterman* v. *Western Union Telegraph Company* was one relating to a tax upon receipts of a telegraph company, which receipts were derived partly from interstate and partly from State commerce, and the return and assessment were in gross. The Court held that the assessment was not wholly invalid, but was invalid only in proportion to the extent such receipts were derived from interstate commerce, and that the collection by the State of the taxes of that portion of the receipts derived from interstate commerce should be enjoined.

The case of Western Union Telegraph Company was one relating to a tax on messages. The Court held that the telegraph company, having accepted the restrictions and obligations provided by Congress, occupied in Texas the position of an instrument of interstate commerce and of a government agent for the transmission of messages on public business, and that the power to tax its occupation could not be exercised by placing a specific tax on each message sent out of the State or sent by public

officers on business of the United States, but that a tax by the State on messages sent by private parties from one place to another, exclusively within its own jurisdiction, would not be repugnant to the Constitution of the United States. In the opinion the Court used the following language, viz: "The rule that the regulation of commerce which is *confined exclusively within* the jurisdiction and territory of a State, *and does not affect other Nations or States, or the Indian tribes*, that is to say, *the purely internal* commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce *which does affect other Nations or States or the Indian Tribes belongs to Congress.*

We have reviewed and see nothing applying in any way to the case at bar in the following cases cited by appellant, viz:

Ex parte Boyer; Pensacola Telegraph Company v. *Western Union Telegraph Co.; Scammon* v. *K. C., St. J. & C. B. Ry. Co.;* and *Coe* v. *Errol.*

We shall not waste any time in dealing with the sections cited from Elliott on Railroads. We do not believe that the properly adjudicated cases bear out his statements or warrant the distinctions he draws.

The other citations by counsel for defendant in error, viz: *Dillon* v. *Erie Railroad Company, United States ex rel. Kellogg* v. *Lehigh Valley R. R. Co.*, and Volume 7 Add. XXXVII,

Interstate Commerce Reports, all depend for authority upon the former Lehigh Valley case, reviewed elsewhere herein.

It seems to us that upon the basis of history; upon the basis of adjudicated cases, and upon the basis of reason, we have shown that the Arkansas Railroad Commission has not the power to regulate the rates in question, and that in attempting to do so they were exercising an unwarranted and unlawful power, and one which the State could not confer upon them.

We respectfully submit that the decree of the Circuit Court ought to be affirmed.

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JAMES B. READ,
Solicitors for Appellee,
The Kansas City Southern Railway Company.

MAX PAM,
Of Counsel.

Supreme Court of the United States.

No. 131.—October Term, 1902.

Felix M. Hanley et al., Members of The Railroad Commission of Arkansas, Appellants, vs. The Kansas City Southern Railway Company.	Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

[January 5, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought in the Circuit Court by a railway company incorporated under the laws of Missouri, against the railroad commissioners of Arkansas, seeking an injunction against their fixing and enforcing certain rates, as we shall explain. The bill was demurred to for want of equity, the demurrer was overruled, and a decree was entered for the plaintiff. The defendants bring the case here by appeal.

The plaintiff owns a road running through several States and Territories. The road after leaving Missouri runs for twenty-eight miles and a fraction through Arkansas to the dividing line between that State and the Indian Territory, then nearly one hundred and twenty-eight miles in the Territory, and then over one hundred and seventeen miles in Arkansas again to Texas. There is also a branch line running from Fort Smith, in Arkansas, to Spiro, in the Indian Territory, about a mile of which is in the State and fifteen in the Territory, and there are other branches. Goods were shipped from Fort Smith by way of Spiro and the road in the Indian Territory to Grannis, in Arkansas, on a through bill of lading, the total distance being a little more than fifty-two miles in Arkansas and nearly sixty-four in the Indian Territory. For this the railroad company charged a sum in excess of the rate fixed by the railroad commissioners, and was summoned before them under the State law. The commissioners decided that the company was liable to a penalty under the State statute, assert their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the State through the Indian Territory or Texas, and intend to enforce compliance with these rates. The only question argued and the only one that we shall discuss is whether the action of the commissioners is within the power of a State, or whether it is bad as interfering with the power of Congress to regulate commerce among the several States and with the Indian tribes. *Smyth* v. *Ames*, 169 U. S. 466, 517.

It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over com-

merce among the States, *Stoutenburgh* v. *Hennick*, 129 U. S. 141; and the distinction hardly is important, since the appellants are asserting similar authority where the loop beyond the State boundary runs through Texas. We may as well add, in this connection, that the present railroad gets the authority for its line in the Indian Territory, through a predecessor in title, from an act of Congress of 1893, c. 169, 27 Stat. 487, and that, by that act, Congress "reserves the right to regulate the charge for freight and passengers on said railroad . . . until a State government shall be authorized to fix and regulate the cost," &c.; "but Congress expressly reserves the right to fix and regulate, at all times, the cost of such transportation by said railroad or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State."

It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce. See also the act of February 6, 1887, c. 104, § 1, 24 Stat. 379; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, and *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557. Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not.

No one contends that the regulation could be split up according to the jurisdiction of State or territory over the track, or that both State and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204; *Hall* v. *De Cuir*, 95 U. S. 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.

It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, *Lord* v. *Steamship Co.*, 102 U. S. 541, and is not subject to regulation by the State, *Pacific Coast Steamship Co.* v. *Railroad Commissioners*, 9 Sawyer, 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. "To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State." 9 Sawyer, 258. Decisions in point are *State* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 40 Minn. 267; *Sternberger* v. *Cape Fear & Yadkin Valley Railroad Co.*, 29 So. Car. 510. See also *Milk Producers' Protective Association* v. *Delaware, Lackawanna & Western Railroad Co.*, 7 Interstate Commerce Rep. 92, 160, 161.

There are some later State decisions contrary to those last cited. *Campbell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 86 Iowa 587; *Seawell* v. *Kansas City, Ft. Scott & Memphis Railroad Co.*, 119 Mo. 222; *Railroad Commissioners* v. *Western Union Telegraph Co.*, 113 No. Car. 213. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the State." 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole.

We are of opinion that the language which we have quoted from Mr. Justice Field is correct, and that the decree of the Circuit Court should be affirmed.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.